IN THE

Supreme Court of the United States

NO. .....

ERNEST J. TYLER,

PETITIONER

VS

STATE OF WASHINGTON

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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I

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Ernest James Tyler prays that a writ of certiorari issue to review the judgments of the Supreme Court of Washington entered in the above matter on March 5, 1970 (petition for re-hearing denied May 27, 1970).

I

CITATIONS TO OPINIONS BELOW

The original opinion of the Supreme Court of the State of Washington, as set forth in Appendix B hereto, *infra* is reported in 77 W.D. 2d 737, 466 P.2d 120 (1970).

II

JURISDICTION

The judgment of the Supreme Court of the State of Washington was entered on March 5, 1970, and a petition

for re-hearing was timely filed and was denied on May 27, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) and United States Supreme Court Rule 22 (1).

III
QUESTIONS ANSWERED

1. Does the imposition of the death penalty violate the Eighth Amendment to the United States Constitution and is the United States Constitution violated by permitting the jury to render the death penalty verdict without standards or guidelines to follow in reaching this decision?

2. Was the petitioner denied a fair trial under Federal Constitutional Standards by the Trial Court's systematic exclusion of a group comprising a substantial portion of the community who are opposed to the death penalty?

3. Was petitioner denied a fair trial under Federal Constitutional Standards by the Trial Court's refusal to permit the issue of sanity to be submitted to the jury.

IV
CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The constitutional provisions, statutes and court rules involved are the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Revised Code of Washington, Sections 9.01.114 and 10.76.010. Because of the length of these provisions they are printed verbatum in appendix A hereto. *infra.*

V

STATEMENT OF THE CASE

On April 1968 the petitioner, Ernest James Tyler was charged by amended information with eight separate felony counts, including three counts of robbery, two counts of assault in the first degree, two counts of attempted robbery, and one count of first degree murder. At the trial the prosecution attempted to attribute the eight charges to the appellant beginning with events on February 21, 1968. The first crime reportedly committed by petitioner took place in the PeeWee Tavern in Seattle, Washington. Petitioner allegedly approached the bartender inside the Tavern and placed a gun to the back of his head. The petitioner allegedly then forced the bartender to take money from the cash register. Following this he allegedly sought to force the bartender to open the safe in the tavern and failing this he took the bartender's wallet and left. The next event apparently occurred on February 22, 1968 at which time a cab driver picked up an individual alleged to be the petitioner at a Tavern in Seattle, Washington and at his direction the cab driver drove to a nearby alley and stopped. At this point petitioner allegedly took the cab driver's wallet and hit him over the head with a gun. The next incident was similar to the first cab driver's experience. The next incident involved an attempted robbery of two women near the Towne House Apartments in Seattle, Washington, petitioner allegedly shot and killed one of the women as the two women were seeking to escape.

At the commencement of the trial, the trial Judge systematically excluded all prospective jurors who were opposed to the death penalty. It is conceded at this point that all of the jurors excluded stated that they would not vote for the death penalty under any circumstances.

During the trial the petitioner took the stand and testified in his own behalf. It was apparent from his testimony that the petitioner was an individual who was institutionalized the greater portion of his life and through his early life had suffered severe emotional traumas. He also testified that prior to the events involved in the case upon which the prosecution based its charges, the petitioner had consumed several types and a great quantity of drugs and alcohol. The petitioner also called to the stand two psychiatrists. Dr. William Ogle testified on an offer of proof based upon the petitioner's testimony concerning the amount of alcohol and drugs he had taken prior to the commission of these crimes, that petitioner under the influence of or affected by the alcohol and drugs which he had consumed would not be able to form a specific intent necessary to commit the crimes as charged. The trial Court permitted the Doctor to testify regarding the effects of alcohol and drugs on an individual such as the petitioner but refused to allow the doctor to testify to the jury concerning his opinion that the petitioner would be unable to form the necessary specific intent to commit the crimes because of the trial court's mistaken belief that the doctor could not testify as to the ultimate issue in the case.

It should be further noted that the jury was given the option of returning the death penalty or sparing petitioner's life, however they were given no standards or guidelines by the trial Court as to what to consider in reaching this decision.

At the conclusion of the trial the jury returned a verdict of guilty as to all eight counts of the information and made a special finding in regard to the first degree murder charge that petitioner should be sentenced to death.

VI

REASONS FOR GRANTING THE WRIT

Question 1.—The Unconstitutionality of the Death Penalty.

The Eighth Amendment to the United States Constitution provides that "excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishments inflicted." In petitioner's opinion the infliction of the death penalty is a violation of the Eighth amendment to the United States Constitution. There can be no question that death is the ultimate form of cruelty, especially death by hanging which is the form of capital punishment in the State of Washington. Death by execution is the cruelest form of death because the executed person knows that it is coming and must suffer the mental anguish of waiting. There also is no question that capital punishment is "unusual," in view of the fact that no one has been executed in the State of Washington in the last seven years, and no one has been executed in the United States in the past

three years. To single out petitioner as the one person to be executed in the State of Washington and the United States when all others similarly situated live would most assuredly be a violation of the Eighth Amendment to the United States Constitution.

In addition to the above the infliction of death as a mode of criminal punishment must fall as a violation of the due process clause of the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment to the United States Constitution provides in part that "nor shall any state deprive any person of life, liberty or property without due process of law." Recent decisions of the United States Supreme Court and various State Supreme Courts in their consideration of "due process of law" have established certain processes the Courts must follow when a state enactment seeks to impinge upon a fundamental right (such as "life"). These are:

1. The court must determine whether the state enactment does 'impose any burden upon" that right. *People vs. Woodey*, 61 CAL 2d 716, 720 (1964).

2. If it is determined that the state enactment does impose a burden upon that right, then a court must make a determination of whether the state has demonstrated a compelling state interest which necessitates an abridgment of the right. *People vs. Woodey, supra.*

3. Even if a compelling state purpose is present it is plainly incumbent upon the state to demonstrate that no alternative forms of regulation would accomplish the

asserted state interest without impinging on the right. *Fort vs. Civil Service Commission*, 61 CAL 2d 331, 334 (1964).

4. In addition to the above the Court when considering due process must take into consideration the enormity of the hurt inflicted *Rochin vs. California*, 242 U.S. 165, 172. (1952).

Thus tested, the infliction of death as a mode of criminal punishment must fall as a violation of due process;

1. It cannot be denied that life is a fundamental right and that the infliction of death "imposes a burden" upon that right; it extinguishes it;

2. The compelling state interest is that which is pertinent in all criminal punishment; it cannot be vengeance or retribution. In re *Estrada* 63 CAL 2d 740, 745 (1967). It can be deterrence, isolation of the individual from society so that he cannot harm it, or rehabilitation. "There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution." In re *Estrada Supra*.

3. For the permissible purposes of criminal punishment, an alternative, less drastic form, namely life imprisonment, is available and effective. It is demonstrable that imprisonment is at least as effective a form of criminal punishment as the death penalty. See *People vs. Ketchel*, 59 CAL. 2d 503 (1963). Thus under the principal set out above, not having demonstrated that death deters more than imprisonment, the state cannot rely on execution to effectuate that purpose of criminal punishment. As to rehabilitation, exe-

cution of course cannot do that. A dead man cannot be rehabilitated. As to the protection of society, imprisonment for life does that. Accordingly, punishment by death must fall under the due process clause. And when the enormity of the hurt inflicted is considered, the due process violation becomes even more apparent.

Former United States Attorney General Ramsay Clark, in a speech in July, 1965, gave the views of the United States Department of Justice on capital punishment; "We favor the abolition of the death penalty. Modern penology with all its correctional and rehabilitational skills affords greater protection to society than the death penalty, which is inconsistent with its goals. This nation is too great in its resources, and too great in its purposes, to engage, in the light of present understanding, in the deliberate taking of human life as either a punishment or a deterrent to domestic crime."

In addition to the above, petitioner challenges the trial Courts submitting the question of life or death to the jury in this particular case without any standards or guidelines as to when and under what circumstances the death penalty should be used. This makes the actions of the jury arbitrary and capricious, and thus in violation to the Fourteenth Amendment to the United States Constitution. This identical issue was raised in the recent case of *Maxwell vs. Bishop*, 398 U.S. 262, 26 L.ed.2d 221 (June 1, 1970) however the United States Supreme Court did not as yet make a ruling on this argument but remanded the Maxwell case

back to the United States District Court for a determination of whether or not the trial Court violated the United States Constitution on other constitutional grounds. At the same time however the United States Supreme Court granted certiorari in two cases where this identical issue has been raised.

Question 2—The Unconstitutjonal Exclusion of Prospective Jurors Opposed to the Death Penalty.

In the recent case of *Witherspoon vs. Illinois*, 391 U.S. 510, (1968) the Court held that a sentence of death cannot be carried out if the jury that imposed or recommended the death penalty was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. The Court on Page 520 of its opinion stated that "no defendant can constitutionally be put to death at the hands of a tribunal so selected."

It is conceded that the prospective jurors excluded in the instant case by the trial Court were individuals who would not under any circumstances in any case vote for the death penalty. It is petitioners position however that the *Witherspoon* decision should be expanded to include even those individuals who would not vote for the death penalty under any circumstances. The reason for this being that, as pointed out in the *Witherspoon* decision, a criminal defendant is entitled to be tried by a cross section of the community and is is unconstitutional to exclude a large portion of that community. Should not the same reasoning apply to indi-

viduals who are convinced that they would not vote for the death penalty under any circumstances? There is no rational reason for excluding all of these people, especially in view of the fact that they certainly make up a large portion of society.

Question 3—Petitioner's Constitutional Rights were violated By the Trial Court's Prohibiting Expert Opinion Regarding Petitioner's Mental Status.

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of life, liberty or property without due process of law. It is petitioner's contention that he was denied due process of law in his trial because the trial court erroneously excluded the opinion of expert witnesses called on his behalf regarding his mental status. On Page 531 of the Statement of Facts the Trial Court set forth the issue as follows:

> "So we are left, if this be so, we are left with the other question of specific intent, and more particularly, the evidentiary question is; can the psychiatrist, can the doctors, based upon hypothetical facts supplied to them, including drug intake, intoxication, etc., answer the legal question as to whether or not the defendant under these circumstances or the hypothetical question, I should say, under the circumstances could form the specific intent to commit specific crimes here charged."

As mentioned above, the offer of proof made through Dr. Ogle's testimony was to the effect that it was his opinion that the petitioner did not have the facilities to form the necessary intent to commit the specific crime charged

because of the large intake of drugs and alcohol. Because of the Court's ruling, however, this opinion never reached the jury. The trial Court was obviously in error in its ruling, even under Washington State Law. In the case of *State vs. Alden*, 73 Wn.2d 360, 438 P.2d 620 (1968) the State Supreme Court of Washington held that the opinion of a qualified expert, if it will aid the jury in reaching its verdict and will not mislead it to the prejudice of the objecting party, it is proper evidence even though it may be an opinion on the "ultimate issue."

This error was pointed out in the dissenting opinion in the instant case starting on Page 772:

> "This is a capital case and the presumption should not be indulged that any error which occurred was harmless error. I am dismayed by implications in the majority opinion that, if this Court is convinced by the State's evidence, it will hold the erroneous exclusion of the appellant's offered evidence to be harmless and non-prejudicial. It is not this Court which must be convinced of the appellant's guilt. It is the jury. And the appellant was entitled to have the jury consider any relevant, competent, and material evidence which he offered in his defense, if that evidence was not otherwise inadmissible by reason of some affirmative rule of law.
>
> Here the rule is, as the majority concedes, that intoxication or mental derangement, even though self-induced, is a defense if it renders the defendant incapable of forming the specific intent which the state must prove in order to warrant a conviction.
>
> The appellant offered medical evidence in the form of a psychiatrist's opinion that, if he had ingested all

of the substances which he claimed to have consumed on the day of the crimes, he would have been incapable of forming such an intent. That opinion should have been received in evidence; the Court having found the doctor qualified to give opinions based on appellant's testimony, however vague that testimony may have been."

It is the petitioner's contention that this error was so flagrant, on such a crucial issue in the case, that the exclusion of this opinion is a violation of the "fair trial" standards implicit in the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

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APPENDIX A-1

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

In all criminal prosecutions, the accused shall enjoy the right to a speedly and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

§1. CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES

Section 1. All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§2. APPORTIONMENT OF REPRESENTATIVES IN CONGRESS

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

§3. PERSONS DISQUALIFIED FROM HOLDING OFFICE

Section 3. No person shall be a Senator of Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken

an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability.

§4. WHAT PUBLIC DEBTS ARE VOID

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection of rebellion, shall not be questioned. But neither the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§5. POWER TO ENFORCE ARTICLE

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

REVISED CODE OF WASHINGTON

Section 9.01.114 INTOXICATION — NO DEFENSE.

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such purpose, motive or intent.

Section 10.76.010

Any person who shall have committed a crime while insane, or in a condition of mental irresponsibility, and in whom such insanity or mental irresponsibility continues to exist, shall be deemed criminally insane within the meaning of this chapter. No condition of mind induced by the voluntary act of a person charged with a crime shall be deemed mental irresponsibility within the meaning of this chapter.

cham v. Farmers Ins. Exch., 255 Iowa 69, 121 N.W.2d 500 (1963). Supporting this conclusion is the rationale of our decision in *Miller v. Allstate Ins. Co.*, 66 Wn.2d 871, 405 P.2d 712 (1965).

We are of the opinion that the trial court properly stayed the arbitration claim of defendant against State Farm Mutual; correctly limited the total award to the $10,278.91, plus $25 costs, in full recompense for bodily injuries arising out of a single accident; and properly directed an apportionment of the award between the two companies in accordance with the respective applicable policy limits.

Affirmed.

HUNTER, C. J., FINLEY, WEAVER, ROSELLINI, HAMILTON, NEILL, and MCGOVERN, JJ., concur.

[No. 40434. En Banc. March 5, 1970.]

THE STATE OF WASHINGTON, *Respondent*, v. ERNEST JAMES TYLER, *Appellant*.*

[1] **Criminal Law—Discovery—Statements of Witnesses—Discretion of Court—Review.** A prosecuting attorney is under no general obligation to submit his evidence, including statements of witnesses, to the defendant prior to trial; however, the trial court has the discretion to order production of such statements. Its ruling on a request to compel production of statements will be disturbed only where there is a manifest abuse of discretion.

[2] **Jury—Selection—Advising as to Length of Trial and Separation.** Prospective jurors can be given an estimate of the time a trial will take and advised that they will probably be kept together throughout the trial.

[3] **Criminal Law—Intent—Evidence—Sufficiency—Time of Challenge.** A challenge to the state's ability to prove the element of intent cannot be determined until after the state has presented its evidence.

[4] **Criminal Law—Insanity—Burden of Proof.** Insanity or mental irresponsibility is an affirmative defense and the defendant has the burden of sustaining it by a preponderance of the evidence. If he is unable to produce substantial evidence the issue should not be submitted to the jury.

[5] **Criminal Law—Insanity—Induced by Alcohol or Narcotics—Effect.** For purposes of pleas of insanity to criminal prosecutions, an

accused must show that his condition was involuntary and not self-induced by alcohol or drugs (RCW 10.76.010).

[6] **Criminal Law—Insanity—Mental Irresponsibility—Meaning of Terms.** Insanity and mental irresponsibility are interchangeable terms, under statutes authorizing such pleas (RCW 10.76), denoting a mental state whereby an accused is unable to tell right from wrong with reference to the act charged.

[7] **Criminal Law—Intent—Determination.** The issue of intent, when supported by substantial evidence, must be resolved by the jury; it may be inferred from the criminal act and circumstances surrounding it.

[8] **Criminal Law—Trial—Taking Case From Jury—Sufficiency—In General.** When considering a challenge to the sufficiency of the evidence, the evidence and inferences therefrom of the challenged party are admitted as true, and all of the evidence is to be interpreted most strongly against the challenger.

[9] **Criminal Law—Intent—Opinion Evidence—Adequacy of Evidentiary Basis.** Opinions offered by medical experts concerning a defendant's capability to form a specific intent to commit a crime are properly refused when unsupported by an examination of him at a relevant time or by reasonably definite and explicit evidence presented at trial; they cannot be founded in speculation and conjecture, as when the evidence forming the basis for the opinion is vague, indefinite, and uncertain.

ROSELLINI, J., HUNTER, C. J., and NEILL, J., dissent.

Appeal from a judgment of the Superior Court for King County, No. 47953, Morell E. Sharp, J., entered June 28, 1968. *Affirmed.*

Prosecution for murder, assault, and robbery. Defendant appeals from a conviction and sentence.

McDonell & Alfieri, for appellant (appointed counsel for appeal).

Charles O. Carroll and *Paul M. Acheson*, for respondent.

HALE, J.—It was a tragic twist of fate that brought Ada White and Mary Robertson to the rear entrance of the Town House Apartments at about 2 o'clock in the morning. They had taken Mary Robertson's dog for a brief outing, and a few minutes earlier or later would have escaped the defendant. As things turned out, the short stroll cost Ada White her life and brought the defendant before the court

for murder in the first degree. The murder of Ada White was but one of eight felony counts set forth in the amended information filed against Ernest James Tyler in the Superior Court for King County.

Count 1 charged him with the robbery of Douglas Ralph Schley by means of a deadly weapon on February 21, 1968. Count 2 charged him with the robbery of Alfred Knapp on February 22, 1968; count 3 charged assault in the first degree with a deadly weapon committed upon Alfred Knapp in perpetrating the robbery. Count 4 charged Tyler with the robbery of Stanley Burrell while armed with a deadly weapon on February 22, 1968; count 5 charged assault in the first degree committed upon Stanley Burrell while perpetrating that robbery. Count 6 accused the defendant of the attempted robbery of Ada White, February 22, 1968; and count 7 charged the first-degree murder of Ada White committed both with a premeditated design to effect her death and while engaged in committing, attempting to commit or withdrawing from the scene of a robbery. Count 8 charged the defendant with the attempted robbery of Mary Robertson February 22, 1968.

The jury found Tyler guilty on each of the eight counts and returned a special verdict on each count that at the time of the commission of the crime he was armed with a deadly weapon. It returned a special verdict on count 7, the first-degree murder count, that the death penalty be inflicted. From a judgment sentencing him to life imprisonment on each count except count 7 and to death in accordance with the verdict of the jury on count 7, the defendant appeals. The evidence supports the judgment. There is abundant credible evidence in the record to permit the jury to find the defendant guilty of murder, robbery and assault as charged in the eight counts.

In addition to a general plea of not guilty to each count, the defendant entered a special plea of insanity and mental irresponsibility, alleging he was insane and mentally irresponsible at the time of the commission of the acts charged, and that thereafter he became, and at the time of plea was, sane and mentally responsible. Since the defendant assigns

error to the court's withdrawal of this plea of insanity and raises other points concerning his mental condition, it will be necessary to relate the evidence in detail as to his actions and demeanor.

At about 2 a.m., February 21, 1968, Douglas Ralph Schley was finishing his shift as a bartender in the Pee Wee Tavern, Seattle, when the defendant walked in and sat at a stool opposite the cash register. Mr. Schley served him a schooner of beer which he paid for. When everyone had left the tavern, the defendant ordered a 6-pack of Budweiser, and Mr. Schley walked to the cooler to fetch it. Tyler walked toward the cooler with Schley. Schley testified that, when he bent over to reach the 6-pack, the defendant put a gun to his head and said, "You know what this is . . . Let's get with it. I am going to kill you." Schley said the defendant uttered a few obscenities, told him to shut up, and repeated that he would kill him. Under menace of the gun, the bartender then went to the cash register and took out all the cash and change. He said the defendant would not touch the money and insisted that he open the safe. Complying with Tyler's orders, Schley put all of the money from the cash register—bills and change—into a paper bag and handed it to the defendant. The defendant took the bag and said, "Let's take the safe," and followed Schley to the back room. Schley told Tyler that he did not have the combination, and the defendant replied, "Don't get smart with me, or I will kill you."

In the tavern's back room, the defendant, still holding the gun on him, took his keys and wallet which held not over a dollar, and when Schley asked him to leave the wallet, the defendant uttered some more obscenities and again said he was going to kill him. Just about the time he was taking the wallet and keys, Schley said, the defendant acted as though he heard something, and walked out of the back room. Schley closed the door and it locked automatically, and he heard the defendant try the key in the door and say, "Open up, or I will blow the door." Schley waited 5 minutes, but heard no sound of the defendant leaving. He then opened the door, found the defendant gone, and tele-

phoned the police. Schley identified the defendant in a police lineup and in court as the man who had robbed him. He described the defendant as a "Nice looking guy," with "kind of crazy" eyes, but amplified that statement to say that he meant by it that the defendant was not to be reasoned with, could not be talked out of anything, and had to be "out of his brain," adding that "Anybody that goes around shooting people is not reasonable."

The next count charged robbery of and assault upon a taxi driver. Alfred T. Knapp, early in the morning of February 22nd, was seated in his Grey Top cab at Queen Anne and Mercer Streets when a radio call directed him to Dez's 400 Tavern. He parked his cab at the front door and, walking into the tavern, asked the bartender who had called a cab. The bartender indicated Tyler, who nodded and followed Mr. Knapp to the cab. Tyler opened the front door and seated himself beside the driver. He told Knapp he wanted an address on Eastlake and said, "Drive to the corner and turn right," a direction which would take them north. Mr. Knapp followed these directions for a while and as they crossed Taylor Avenue he turned to his passenger and asked what part of Eastlake the defendant wished. The defendant, now with a gun in his right hand pointed at the driver's ribs, said, "Never mind, Eastlake." He directed Knapp to drive up into an alley in the 550 block of Roy Street and then ordered him to turn off into a wide space in the alley and stop. Knapp testified that, while holding the gun. "He went through my pockets. He asked for my money, and I took everything out that I had in my pockets and gave it to him." Describing how Tyler, in making a search, felt a strap on his body and struck him with the pistol, Knapp then testified:

> A. Yes, he felt the strap. I have an artificial leg, and he felt the strap on the leg, and he said, "Do you have a money belt?" Q. What was your response? A. I said, "No, that is a strap on my leg." Q. And then what happened? A. He ordered me to get out of the cab on the left-hand side, on the driver's side and not move. Q. And did you comply with this? A. I did. Q. And then what occurred? A. He walked me over to the corner of the

back of the house where there is a garbage dumpster. Q. By that, what do you mean? A. Well, it is disposal. Companies put them out. They hold several garbage cans. They are about four feet high roughly. Q. And you say he directed you to one of these? A. Yes, and he laid the lid on the ground of the garbage dumpster and took his left hand and spread everything out that was in there and then ordered me to get into it. Q. Did you make any statements with respect to his request? A. I told him I couldn't get into it. Q. Did you explain to him why? A. Yes. Q. What did you say? A. I said, "I have an artificial leg. I cannot get up that high." Q. And at that point, then what happened? A. He ordered me to turn around and face the dumpster. Q. And did you comply with this request? A. Yes. Q. And what happened following this? A. Well, he stood at my back. Q. Were you able to hear or see anything that was going on behind you? A. I was able to hear that gun click in my back. Q. And then what occurred? A. Well, it was only a few seconds. He said, "I won't hurt you." And with that, he hit me on the head. Q. And after being hit on the head, did you remain conscious or lose consciousness? A. I lost consciousness for a few seconds.

Mr. Knapp went on to say that the defendant took $42 from him and that he had to be taken to the hospital where he got his head stitched. The papers inside his wallet were never returned. He described his assailant to the police as being about 6 foot 2 inches and weighing 175 to 180 pounds, clean shaven, of sandy complexion and wearing a black raincoat and a colored shirt. He identified the defendant in a police lineup later that day, February 22nd, and again in court at the trial, as the man who had robbed and slugged him with the pistol.

Mr. Knapp testified that, during the robbery, the defendant took the inside of his wallet and business cards, saying, "I will take these because they have my fingerprints on them," and that he appeared to know what he was doing. On cross-examination, Mr. Knapp said that, throughout the robbery, defendant was very calm, acted normal in perpetrating a robbery and was, as he put it, all business. Describing Tyler's normal manner to the jury, he said, "he went about what he was doing in a normal sort of way

. . . Just like he was concentrating on what he was doing," and that he seemed without apparent nervousness, apprehension or fear.

Another taxicab driver who crossed defendant's path that early morning of February 22nd in Seattle was Stanley Burrell. As Mr. Burrell sat in his Farwest cab parked at 6th and Pike reading a newspaper, the defendant opened the front door, climbed in and told Burrell to take him to the 200 or 300 block on Belmont East. Burrell drove to where he thought the defendant had directed but the latter said, "Keep driving. I will recognize it when I see it." Tyler seemed to know where he wanted to go for he said to the driver, "Make a right on Roy and a right on Boylston, and I will recognize it." When they came to a dark street, the defendant said, "This is it," and the driver stopped in front of some open-front garages. The defendant, now with a gun in his lap pointing at the driver, then said, "This is it. I want all your money." Mr. Burrell, attempting a ruse, took out his billfold to show the defendant that it was empty but the defendant said, "You must have some starting money," and reaching over extracted eight or nine $1 bills from the driver's shirt pocket. The defendant said, "Dig again," and the driver then produced a handful of change and handed it to the defendant.

Tyler then directed Burrell to drive the cab into an open garage and told the driver to let the motor run. He ordered the driver to get up in front of the car and face the wall and take off his coat. Next, according to Burrell's testimony:

> A. Then he stepped back, and I heard the click of a gun. I don't know whether he was loading a gun or unloading it. I have no idea, with me facing the wall, and the next thing I knew I got clonked on the head. Q. And did you lose consciousness at that time? A. Not completely, no. Q. What did you do? A. I went down on one knee and stayed there, and he immediately got in the car and drove away.

The driver called the police, describing the defendant as "a tall fellow, with a dark topcoat on, looked like a raincoat, light weight, and I says dark haired, possibly six, six-one

tall, and large prominent chin, and clean shaven and dark trousers." Burrell was taken to the hospital where stitches were taken in a scalp wound inflicted by the blow with the gun.

There were two more attempted robberies and a murder. Mary Robertson and her husband had come to Seattle from Port Angeles to visit her sister-in-law, Ada White. Ada White, the widow of a retired army officer, worked at the Seattle Convalescent Center as a registered nurse and had lived at the Town House Apartments for about a year. The Robertsons had visited her there about once a month. The Robertsons had dinner with Mrs. White at her apartment on the 11th floor that evening of February 21, 1968, and after dinner the three talked and watched television. When the late movie had been on for about 35 minutes, they concluded it wasn't worth watching and decided to go to bed. The Robertsons had brought their dog with them and felt they should take it outside.

Mary Robertson and Ada White left Mr. Robertson in the apartment, and, putting the dog on a leash, took the freight elevator which carried them down to the fourth floor where the rear entrance to the Town House was located. At the fourth floor, the two ladies, leading the dog on its leash, turned right from the elevator and walked out the back door, down some steps and through the portico into the parking area. There they unleashed the dog and walked to the end of the apartment house parking lot. After the dog had run for perhaps 10 minutes, Mrs. Robertson observed the form of a person walking rapidly up the steps from the street and come to a stop at the top, and then back into the shrubbery—a large hedge. She could discern the body of a man outlined in the back by lights from an apartment.

Mrs. White's back was turned to the figure but Mrs. Robertson asked her if she had seen it and told her where to look without pointing. Alarmed, the two ladies started back to the apartment without waiting to leash the dog. They walked rapidly and had just reached the bottom of the steps at the lighted portico when a voice said, "Just a minute, ma'am." They both turned to see a man in a dark

overcoat with a gun pointing right at them. His tone was, as she described it, "Just clear, loud voice, not a shout." He then said, "I want your money. I want your wallets." Both ladies replied, "we have no money," and walked up the steps to the well-lighted landing. The defendant followed them to the entryway of the apartment house and with pistol in hand aimed between them said, "I am serious. I mean this. I want your money. I want your wallets," and the ladies again said that they had no money and Mrs. Robertson held up her hands so he could search her, which he did.

Holding the gun in his right hand, Tyler drew a small coin purse from Mrs. Robertson's pocket which she did not realize was there because the coat belonged to Mrs. White. He returned the coin purse to Mrs. Robertson's pocket, she thought, because it was jeweled and resembled a lady's compact. She then lifted her arms slightly while the defendant searched the other pocket.

Then Mrs. Robertson, who had the key, put the key in the lock, opened the entrance door and walked through the doorway followed closely by Mrs. White. Mrs. Robertson ran to the elevator and reached for the elevator button. She pressed the button and stood to the right of the elevator while Mrs. White stood on the left of the elevator and the defendant moved to and stood in the entry doorway, blocking the door opening. The three stood there in silence for a few moments and the two women could hear the elevator approaching their floor. The defendant remained there silently with his gun pointing between them. Then, as the elevator came nearer, he said, "If there is a husband upstairs it is going to be bad for him." The silence continued and the elevator reached the floor and nothing more was said, and then, as Mrs. Robertson testified:

> A. Then the elevator reached our floor. The door slowly started to open, and suddenly he reached out, this man reached out with his arm and flung Mrs. White, flinging her around so she hit the wall, straightened up, and when she straightened up she was facing him directly. Q. What did he do, if anything, with the gun at that time? A. He raised the gun. Q. Were you watching

the gun? A. I was watching the hand and the gun and Mrs. White's face. Q. Would you describe what actions he took with the gun? A. He raised the gun from waist position where it had been most of the time, raised it—Q. To what level? A. —about heart level as far as Mrs. White is concerned, and then I heard the report. MR. ALFIERI: Your Honor, I am having great difficulty hearing. THE COURT: We didn't hear this last. THE WITNESS: He elevated the gun, raised his hand slowly, quite steadily, very steadily, and shot. Q. (By Mr. Acheson) did he make any forward movement at all with the gun? A. Slightly, yes, yes. Q. And what happened then? What did you do then? A. The hand and the gun disappeared. I was watching Mrs. White. Q. What was Mrs. White doing? A. She slumped against this wall and spoke to me and said, "Mary, he shot me."

Mrs. Robertson helped Mrs. White to her apartment and called the police. Ada White died at the hospital a short time later. Mrs. Robertson described the defendant to the police as "a tall man, at least six feet, long, long face, dark wavy hair, quite erect in stature, wearing a dark, either dark blue or black raincoat," and identified him in the courtroom and at a police lineup as the man who robbed them and shot Mrs. White.

The defendant was arrested a little while later at the corner of Summit and Olive in Seattle about six blocks from the Town House Apartments. He had hailed a taxicab, got in the back seat, and had calmly given the driver explicit directions. The driver started the cab but had moved no more than 40 feet when police officers surrounded it. The driver, referring to the defendant, testified, "Yes, he got in and very nonchalantly said, 'Take me over to 720 Queen Anne, will you?'" Watching the police officers search Tyler, the driver saw a gun in his belt. Throughout the capture and arrest, said the taxi driver, the defendant appeared very quiet, very calm and did not appear to be intoxicated.

Police officers who captured and arrested Tyler corroborated this description, testifying that the defendant at the time of his arrest understood and obeyed their directions and that he appeared normal. Testimony given by the vic-

tims of the assaults and robberies and the police officers who captured him describing his demeanor, appearance and actions enabled the jury to believe that, throughout the interval of time preceding, during and immediately following each crime, the defendant was mentally responsible, knew what he was doing, understood the moral nature of his acts and comprehended their legal consequence.

Defendant makes 11 assignments of error, some of which do not merit discussion; others will be dealt with in combination. His first assignment of error concerns the court's refusal to direct the prosecuting attorney to furnish him with copies of "the written statements given by the State's witnesses to the police and to the Prosecutor." Copies of all written statements given by the state's witnesses to the police and to the prosecutor were requested by the defense before trial. The prosecuting attorney, answering this request, stated that he would supply the names and addresses of all witnesses the state intended to call, but objected to furnishing the defendant with their written statements. Little is shown in the record or briefs to overcome the prosecution's objections. Other than to assert that, from past experience, police officers are reluctant to discuss their testimony with defense counsel, the defendant neither showed nor offered to show any reasons why the court should, in advance of trial, order the production of any or all of the written statements.

[1] It is a general rule in this country, supported, we think, by the great weight of authority, that the prosecuting attorney is under no general obligation to submit any evidence he has in his possession to counsel for the defense. This rule applied to the written statements of witnesses as well as to substantive evidence. Whether the court will direct the production of written statements of witnesses in advance of trial, or at all, is a matter peculiarly within the trial court's discretion, and its ruling on that point will be disturbed only when there has been a manifest abuse of that discretion. In an unbroken line of precedents, this court has adhered to these principles and we find nothing in the record before us to establish that the trial court, in

refusing to direct the production of the requested statements, abused its discretion. *State v. Payne*, 25 Wn.2d 407, 171 P.2d 227, 175 P.2d 494 (1946); *State v. Thompson*, 54 Wn.2d 100, 338 P.2d 319 (1959); *State v. Peele*, 67 Wn.2d 893, 440 P.2d 599 (1966); *State v. Boehme*, 71 Wn.2d 621, 430 P.2d 527 (1967); *State v. White*, 74 Wn.2d 386, 444 P.2d 661 (1968); *State v. Smith*, 74 Wn.2d 744, 446 P.2d 571 (1968).

Defendant, citing *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968), next claims error in what he describes as a systematic exclusion of a substantial portion of the community from the jury because, he asserts, the court declined to sit all prospective jurors and alternates who were opposed to the death penalty. Our search of the record and study of controlling authorities reveals no systematic exclusion of any class of people from the jury. There is nothing in the record or the briefs to substantiate this assignment of error, and we find it to be without merit.

[2] Defendant assigns error to a denial of his motion for a mistrial made when the court informed prospective jurors that jurors in another homicide case had been kept together; that the instant case might last as long as 2 weeks; and that the jury would be kept together throughout the trial. He contends that this information encouraged some prospective jurors to offer excuses which they otherwise would not have asserted in order to avoid serving. No authority is cited for the proposition that conveying information of this kind or giving prospective jurors an estimate of the time they will be sequestered impairs the selection of an impartial jury or constitutes a systematic exclusion of a class of jurors from jury service. We do not believe it error for the court to give prospective jurors an estimate of the time the trial will take or to advise them that they will in all probability be kept together throughout the trial. Moreover, when asked if he had any objection to jurors who had sat on the other case being excused, defendant said he had none.

[3] In his fourth assignment, defendant claims error when, at the commencement of trial and before a jury had

been impaneled and sworn, the court denied his motion to dismiss count 7 charging murder in the first degree; in his fifth assignment, he urges error in the court's refusal to dismiss all other counts. He based these early motions on a claim that in the opinion of three psychiatrists the defendant at the time of the offenses charged was mentally incapable of forming a specific intent to commit them. These motions, we think, are untenable. Motions to dismiss, for want of what the accused described as specific intent, made even before a jury had been selected involved one of the very issues which would necessarily be resolved in the trial of the case for each count charged a crime requiring intent. Whether there would be sufficient evidence to submit the issue of intent—or any other elemental issue—to the jury was a question of law for the court to resolve. *State v. Reynolds*, 51 Wn.2d 830, 322 P.2d 356 (1958). Before ruling on a motion to dismiss based on a failure to establish one of the elements of the crime charged, the court must apply the familiar test that the evidence and all reasonable inferences to be drawn from it will be considered in a light most strongly against the challenger and most favorably to the opposing party. *State v. Woody*, 73 Wn.2d 179, 437 P.2d 167 (1968); *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965); *State v. Jesse*, 65 Wn.2d 510, 397 P.2d 1018 (1965). The court could not test the sufficiency of the evidence until it had heard it. Consequently, defendant's claim made before trial that he was unable to form an intent to commit the crimes charged was premature and properly denied. Other aspects of this assignment arising during trial and involving the question of criminal intent will be discussed in connection with assignments 7 and 8.

As set forth in the brief on appeal, assignment 6 claims error in the withdrawal of the question of mental irresponsibility from the jury; assignment 7 claims error in the ruling that psychiatrists would not be allowed to answer hypothetically the legal question of whether defendant could form a specific intent to commit the specific crime charged; and assignment 8 specifies error at the exclusion of psychiatric opinion evidence as to whether, at the time of the

crimes, defendant was sane under the right-wrong test. Discussions of these assignments, closely related as they are in the record, will necessarily overlap and commingle.

The defendant, in accordance with RCW 10.76.020, entered a written plea of insanity and mental irresponsibility as of the time of the commission of the acts charged in the information, alleging in his plea that he had since become and at the time of arraignment was sane and mentally responsible. The court withdrew this issue from the jury to which the defendant directs his sixth assignment of error. Whether there was competent evidence to support that issue involves to some degree defendant's mental state or condition induced by the voluntary ingestion of drugs and alcohol—a point which will be discussed later in connection with other assignments.

[4, 5] A plea of insanity or mental irresponsibility is an affirmative defense and places on the accused the burden of sustaining it by a preponderance of the evidence. *State v. Collins*, 50 Wn.2d 740, 314 P.2d 660 (1957); *State v. Putzell*, 40 Wn.2d 174, 242 P.2d 180 (1952); *State v. Mays*, 65 Wn.2d 58, 395 P.2d 758, *cert. denied*, 380 U.S. 953, 13 L. Ed. 2d 970, 85 S. Ct. 1086 (1964-65); *State v. Niblack*, 74 Wn.2d 200, 443 P.2d 809 (1968). If the record is devoid of substantial evidence in support of the plea of insanity or mental irresponsibility, it is error to submit that issue to the jury. *State v. Piche*, 71 Wn.2d 583, 430 P.2d 522, *cert. denied*, 390 U.S. 912, 19 L. Ed. 2d 882, 88 S. Ct. 838 (1967-68); *State v. Rio*, 38 Wn.2d 446, 230 P.2d 308 (1951). The insanity and mental irresponsibility contemplated by the statute authorizing this plea means an involuntary state and condition; the accused must show that the mental condition is involuntary and not self-induced, for the statute expressly excludes mental conditions produced by the voluntary acts of the defendant:

> Any person who shall have committed a crime while insane, or in a condition of mental irresponsibility, and in whom such insanity or mental irresponsibility continues to exist, shall be deemed criminally insane within the meaning of this chapter. *No condition of mind induced by the voluntary act of a person charged with a crime shall*

be deemed mental irresponsibility within the meaning of this chapter.

(Italics ours.) RCW 10.76.010.

[6] Under statutes which authorize a plea of insanity (RCW 10.76), insanity or mental irresponsibility are interchangeable terms synonymously employed in the criminal law (*State v. White*, 60 Wn.2d 551, 374 P.2d 942 (1962); *State v. Schneider*, 158 Wash. 504, 291 P. 1063, 72 A.L.R. 571 (1930)), to denominate a mental state or condition embodied in what has long been referred to as the M'Naghten Rule, first announced in 1843. *M'Naghten's Case*, 8 Eng. Rep. 718 (H.L., 1843). The inexorable processes of time have wrought changes in the language of the rule since its first announcement but left its original meaning essentially intact. The M'Naghten Rule in this state describes insanity or mental irresponsibility as a disease or mental condition affecting the mind to an extent that, at the time the crime is alleged to have been committed, the mind of the accused is so diseased or affected that he is unable to perceive the moral qualities of the act with which he is charged and is unable to tell right from wrong with reference to the particular act charged. *State v. White*, 60 Wn.2d 551, 374 P.2d 942 (1962); *State v. Carpenter*, 166 Wash. 478, 7 P.2d 573 (1932); *State v. Putzell*, *supra*. In order to warrant an acquittal on the basis of insanity or mental irresponsibility, the accused must establish his mental illness by a preponderance of the evidence; and under the statute which authorizes the accused to plead insanity, the condition of mind urged as a defense cannot be induced by his voluntary acts. RCW 10.76.010; *State v. Rio*, *supra*; *State v. Huey*, 14 Wn.2d 387, 128 P.2d 314 (1942).

In withdrawing the issue of insanity and mental irresponsibility raised by the defendant's written plea of insanity, the court looked to the record. Aside from the defendant's testimony that he had voluntarily taken narcotic and hallucinogenic drugs and other drugs and alcohol, there was no evidence showing he was mentally irresponsible or legally insane. His testimony concerning his mental condition during the time of the crimes charged, and as shown in

the evidence, established no more than that he could not remember what he had said or done.

Defendant's testimony, standing alone, that he could not remember or recall any of the crucial events depicted in the evidence does not meet the tests of the M'Naghten Rule for two reasons: First, the loss of memory described by him was, according to his own testimony, attributable to his voluntary taking of drugs and liquor during a period of time immediately prior to the events which were shown in the state's evidence as a basis for establishing the defendant's guilt. Second, he did not testify nor offer by competent evidence to prove that—except for the effects of drugs and alcohol—he was insane or mentally irresponsible at the time of the acts charged.

The defense of insanity or mental irresponsibility places upon the accused the responsibility of showing, *inter alia*, by a preponderance of the evidence that the mental condition interposed as a defense was not voluntarily induced nor produced by voluntary intoxication. Neither of the two psychiatrists called by the defendant to substantiate defendant's plea of insanity testified that they had examined him before or during a relevant period after his arrest to determine if he was insane and mentally irresponsible. Their opinions as to his mental condition at the time of the commission of the crimes charged were necessarily based on his own testimony as to drugs and alcohol taken by him during a period of time just prior to the interval of the acts charged. His proffered proof thus did not go beyond describing a condition induced by drugs and alcohol taken by him at his own volition and with knowledge of what he was doing. Defendant thus sought to assert as a defense a mental condition induced by his own voluntary actions—a condition of mind we find not relevant to his plea of insanity under the statute (RCW 10.76.010). The doctors did not offer to testify that, in their opinions, the defendant either at or before trial or during the times when the crimes charged were shown to have occurred, was suffering from such a disease of the mind as would render him mentally irresponsible or insane; and the defendant offered nothing

to indicate that during any of the same intervals he was involuntarily insane or mentally irresponsible. *State v. Huey, supra; State v. Bower*, 73 Wn.2d 634, 440 P.2d 167 (1968).

There being no substantial evidence to sustain the issue of insanity or mental irresponsibility as pleaded under the statute, it would have been error to submit that question to the jury, and the court properly withdrew it from their consideration. *State v. Piche, supra; State v. Rio, supra.*

But the record is replete with evidence that the defendant was, in contemplation of law, mentally responsible. Aside from the depravity and criminality of his actions as described by the witnesses, and in addition to the legal presumption of sanity, the jury had much before it upon which to hold the defendant criminally responsible. There was abundant testimony from the victims and the police to show that the accused at all times understood the nature and quality of his acts, carried them out with cool, if brutal, assurance and with an ostensible design and capacity to make good his escape from the law after committing them. The evidence depicting the circumstances surrounding the commission of each crime readily permitted the jury to find that at all relevant times defendant appreciated reality, knew where he was and wanted to go, comprehended his role in each crime, was aware of the surrounding circumstances, understood the legal consequences of his actions and sought to flee them. These concepts are inextricably germane to the question of criminal intent, next under consideration.

Because—apart from the court's withdrawal of the insanity issue—the defendant's remaining assignments of error relate to proof of his capacity to form an intent to commit the crimes charged and involve his ingestion of drugs and alcoholic liquor, his testimony will be summarized.

Tyler began his direct examination by stating that he understood the proceedings of the trial and had been advised by his attorney. He did not claim to be either incompetent or under a mental disability at trial. He said that he had been convicted in 1944 or 1945 of a crime and at the

age of about 17 years had been sentenced to the California State Prison at San Quentin. Earlier, as a child of 5 or 6, he had been placed in the Washington Children's Home and later in the Luther Burbank School. He said that he had completed approximately 11 years of schooling and had never been treated for a mental disease or disorder.

He had been convicted of a felony in Washington, he said, sentenced and then paroled. He explained his presence in Seattle at the time of the offenses charged by stating that, while on parole in Wenatchee, he had been arrested for drunken driving; then 3 days later while on reinstated parole he became drunk again and, scared that his parole would be revoked, left Wenatchee and came to Seattle. In leaving Wenatchee, he said, he violated the conditions of his parole.

He said that because he violated his parole in coming to Seattle, he used the name Peterson thereafter instead of his true name. To establish this false identity, he bought some identification papers consisting of "Driver's license, things like that." Relating bits of his personal history, Tyler told the jury that he had run away from the Preston Reform School in California—having earlier been sent there for burglary of a dry cleaner's establishment. Later, while in San Quentin, he started using drugs for the first time—Benzedrine, inhalers and marijuana. Since his release from San Quentin, he testified he had taken many different drugs—"All kinds of amphetamines, methedrine. I have used morphine and Dilaudid, cocaine and heroin, not to excess." He had been convicted, he said, of burglarizing a laundry in Port Angeles, Washington, and later of grand larceny by check. At the time of the check offense, he said, he had been using what he referred to as "Speed," a drug whose composition he did not know but described as "just a stimulant," and was using amphetamines and methedrine, too, all of which he bought illegally when he would "run into somebody that had them." He said that, when last serving time in the "Washington State Institution," it was difficult to obtain drugs, and he seldom got them there.

Bringing his recollection down to about February 22nd

—Washington's Birthday—just before the commission of the offenses charged, he described on direct examination his activities in and around Seattle. He said that he was in Seattle on February 21st and thought he was living at the Tropics Motel but was not sure whether it was the Tropics or City Center Motel. Although not certain of it, he believed he went to the Space Needle Restaurant on the 20th, but on the 21st he said he arose

> I would say around 10:00 o'clock or 10:30. It was afternoon. The sun was out, and it had warmed up a little, and I went up to a couple friends' house, girl friends, and one of them had to go to an airport, had to go to the airport that day. Q. Of the 21st? A. Yes. Q. All right. A. And I and this one girl, Phyllis, we took a walk, just walked around town and had a few drinks. I think we went to, I couldn't say for sure, it was in the afternoon, the Grosvenor House, I think. I was going down to see about buying a car. She left me. It was around, I would say, about 2:30 or 2:00 o'clock, and I went down to see about buying a car.

The day before, on the 20th, he said he had been "taking amphetamines, pills and drinking," and that the amphetamines made him "high." He remembered promising a girl named Phyllis on the 21st that, when he bought a car that day, he would drive her to the airport to catch a 3 o'clock plane. The car he wanted to buy, he said, was not available but

> [T]he man that told me that he was going to let me use the car, works at the, I know it's one of the Rambler Companies, but I don't know which one. I cannot remember the first name. It was up around 13th, 12th or 13th. It might have been Midtown Rambler. I don't know for sure. But, I explained to him that I needed the car; that I had to take this girl to the airport, and it ended up that he drove me and her out there and then drove me back, and the car was back when we got back.

According to his testimony of his activities, he had been taking drugs before going to the Sea-Tac Airport and kept on taking them at irregular intervals thereafter. He did not know, he said, how much he had taken, but did know that he bought 30 pills at $1 each and that they were 10 grain

pills of what is called "Christmas Trees," and he supposed the medical term for Christmas Trees was Dexedrine. He could not be sure how many Christmas Trees he ingested for he did not know how many of the pills he had left. Then, after his return from the airport he said he started drinking pretty heavily.

About 7 o'clock the evening of February 21st, he said he went to the Kansas City Steak House and had a steak dinner, then drove around in the car. He then went to several nightclubs in the downtown area taking some drugs during the intervals. Using a needle, a syringe and eyedropper, he said he shot some "what they call, Blu-Morphan. I think it is a synthetic morphine." He could not specify the amount but guessed it to be "one and a half, two pills," but the quantity and time of taking were uncertain and only vaguely described by him because, as he then testified, he was not even certain that he took any of the drugs at all on the 21st of February. "I don't even recall. I cannot even say I shot anything on the 21st, because I don't know if I did or not . . . I possibly did, because I usually did, and it is just a matter of habit, I guess."

He did say that he had a car, had driven it back from the airport, and had parked it within walking distance of the Kansas City Steak House. He said he went to a dining room called the "El Gaucho" that night or the afternoon of the 21st. Professing uncertainty of memory, he repeated that he did not know if he shot "Blu-Morphan" on the evening of the 21st, but remembered he had been taking "Black Bombers" or "Black Panthers" that night, which he thought contained methedrine but did not know their strength or how many he had taken. He said he had been drinking alcoholic liquor, too, that night because the pills made him thirsty. After a recess in trial, he corrected his testimony to say that these events just described took place on the 20th of February instead of on the 21st as just related.

The defendant on direct testified that he spent quite a bit of time around the Kansas City Steak House and a place called the "Outer Limits Tavern" since being in Seattle. Having amended his testimony to relate the events just

described to the date of February 20th, he proceeded on direct examination to testify as to the events on February 21st. He said he awoke around 9 or 10 o'clock after having taken a couple of Nembutals to sleep on the night before. He described these as "Yellow Jackets."

He slept that night at the Tropics Motel. He was feeling groggy, he said, when he awoke, so he took a couple of drinks of Vodka, and then, in the dining room of the Tropics Motel where he was staying, he took a couple of pills which he called "Black Bombers." He left the Tropics around 11 or 12 o'clock that day of the 21st to find the car he said he had parked downtown. As he remembered it, he found the car at First and Pike or Pine, went into Johnson's Tavern at First and Pike, and then to a friend's house where "we smoked a couple sticks of marijuana," around noon of the 21st. From there he walked to the Outer Limits, had a couple of drinks and sat around just talking. Around 6 o'clock that evening, he called the car lot where he had obtained the car, told the man who had turned it over to him that he would park it on the side street, and that he did so, and the man came out and got the keys to it. This accounted for his actions according to his version of the events until 7:30 or 8 o'clock the evening of the 21st.

Around 7:30 or 8 he guessed, he went to a nightclub called "The Fifth Amendment" where later on he took some narcotics he referred to as "Christmas Trees." He was feeling pretty good for a while after smoking the marijuana, so he did not take the Christmas Trees right away, but by the time he got to The Fifth Amendment he was ready to take some more Christmas Trees. Meanwhile, he said he was drinking vodka collinses but did not know how many of these he drank. He said he had a steak dinner at The Fifth Amendment and then he said later he went to Bob's Chili, a block away, and ate another steak, asserting that the marijuana must have given him an appetite. He said he left Bob's Chili at around 9 o'clock and went back to The Fifth Amendment where he took an LSD pill by trying to shoot it into his arm:

I tried to shoot it, and I had never taken it before. I tried

to shoot it, and it burnt, so I just ate it out of the spoon that I was cooking it in.

Tyler said he had no recollection of events thereafter until he remembered talking in the Seattle city jail to Mr. Mullen, a Seattle detective, and that he was in a padded cell when the officers came to get him. He said he could not remember his conversation with Detective Mullen, but then, recalling earlier events, said that when at Bob's Chili he "shot a cap of cocaine that a friend of mine gave me. He knew that I used Speed. He was pretty well loaded. He was just in a friendly mood, I guess." He testified that he had no recollection of being in the Pee Wee Tavern, of robbing Mr. Knapp or of robbing either of the taxicab drivers, and had no memory either, he said, of being at the Town House Apartments or ever seeing the witness Mary Robertson.

In deciding whether the defendant's testimony on direct examination laid a foundation for the admissibility of opinion evidence concerning his mental capability of forming an intent to commit the crimes charged, the record makes clear that these claimed conditions were induced by the voluntary consumption of drugs and alcohol. Nor is there escape from the marked vagueness and uncertainty concerning the quantities, strengths and kinds of drugs ingested by him and the indefiniteness as to the intervals in which he claimed to have taken them.

The defendant's testimony on cross-examination was similarly vague, indefinite and uncertain. He said he had been released on parole from the Washington State Penitentiary in November of 1967 and repeated that, when he came to Seattle from Wenatchee, he was in violation of his parole and that he used the name of Peterson to conceal his identity and had used this name when negotiating with the Midtown Rambler Automobile Agency. He said that before coming to Seattle he had worked as a carpenter in Wenatchee in November of 1967 but was vague as to his starting and terminating times, placing his commencement from the "10th or 11th, 12th, 13th or 14th" of November and ending "after New Years. I don't remember the exact day. Whether it was the first or second week of January that I

came over here, I don't remember." He remembered that he earned enough as a carpenter to "get 50 some dollars back in income tax" and also that he worked in the apple orchards for $2 an hour. When asked if these earnings, were the money he lived on when he came to Seattle, he answered, "No, I had other money." He said he had not worked since coming to Seattle.

He could not recall the last name or the address of the girl friend he drove to the airport on February 20th, and offered no corroboration whatever of this event. He could do no more than describe the approximate location of the apartment house where she lived. He said, on cross-examination, that they walked downtown around noon, went into a nightclub called the "Plaid Piper" and had a drink, that after they left that place she told him she had to go to Portland, and that he told her he was going to buy a car and would drive her to the airport. He arranged for the purchase of the car, he said, with a man named "Ted" at Midtown Rambler, left a $5 deposit and was told to return the car next day. He testified, "I signed the papers and everything. That was to use this car, to try it out . . . it was a red, a red two-door six." He called neither the girl friend nor the Rambler salesman as a witness and offered no explanation therefor, and presented no witnesses to substantiate his activities and demeanor during February 20th and 21st.

Throughout his cross-examination, his descriptions of the amounts, the kinds of drugs, narcotics and alcohol, their strengths, the intervals of taking, and his identification of them was indefinite, vague and doubtful. Asked if he had pills in his pocket when he went downtown on the 20th of February, he answered, "20. Yes," and when asked if they were Dexedrine or biphetamine, replied, "None of them . . . I think they were the amphetamine, Dexedrine, Christmas Trees, yes." He said sometimes he bought 20 and at other times 50 at a time. He could not remember how many pills he took while at the El Gaucho or at the Kansas City Steak House on the 20th, saying, "I cannot tell you any time how many I took here and there, or here and

there. I don't really know. I took them all day. I ate them like peanuts." He could not say how much liquor he drank on the night of the 20th before returning to his quarters at the Tropics Motel. He said on cross-examination that he went to bed that night of the 20th but awoke and took some Yellow Jackets to go to sleep on.

The vagueness and uncertainty of his testimony is illustrated in his testimony on cross-examination that he may or may not have eaten breakfast that morning, the 21st; that he had a couple of drinks of vodka; that he took three pills from which, as he said within one-half hour after taking them, "I was straightened out pretty good," and then walked to the area where he had parked the car.

After walking around the area where he had left the car parked, he found it but decided not to move it. Without specifying the time, he said that after locating the car, he went to Johnson's Tavern and had some T-Bird flips—five or six—and left the tavern to get some drugs. He said that he "went up to the Outer Limits and got 30 Black Bombers and then came back to Johnson's [Tavern]." From there he walked "quite a while" to a friend's house and there smoked two marijuana cigarettes. His testimony concerning his activities from then on as to the time and amounts of drugs taken is even more vague and speculative. He recalled walking down First Avenue. He thought he made a couple of stops at taverns and took pills with drinks—three or four pills, he could not recall exactly—and ended up at Johnson's Tavern. His testimony relating to his return to Johnson's Tavern and the taking of drugs there is equally indefinite and vague:

> Q. But at Johnson's, did you have a couple drinks there with pills? A. I don't remember really taking them or not. I might have. I might not. I don't know.

From Johnson's Tavern, he said he walked uptown to the Outer Limits or a steak house where he thought he bought some pills, but was not sure of this and when asked if he had taken any there said, "I probably did. I probably give some away," but when pressed further on cross-examination testified: "I said I might have stopped and taken three

or four pills in a couple of taverns. I don't know." He could not fix the time of his return to the Outer Limits beyond saying, "I couldn't tell you. It was in the afternoon." He probably took some more pills, he said, because he "usually did." Again, he was vague and indefinite as to his consumption of drugs or alcohol. He said that he sat there and talked and drank T-Bird flips. He said he bought 15 more pills, but didn't think he was out of them. He thought he gave some of the pills away because he believed the pills make one generous and freehearted, but did not know how many he had given away.

It was close to evening, he said on cross-examination, when he left the Outer Limits—around 6 o'clock—because he thought it was just getting dark and he drove the car he had rented back to the place where he was to return it and from there walked to The Fifth Amendment Tavern and Cocktail Lounge—arriving there about 8 o'clock or possibly earlier, at 7 or 7:30. He said he had dinner at The Fifth Amendment because he thought the marijuana he had smoked had made him hungry. Marijuana, he said, gives one an appetite. He said he had some more drinks at The Fifth Amendment and took some more pills, adding "Like I said, I ate them like peanuts." His drug taking at The Fifth Amendment he described:

> Q. Did you take any more pills? A. You keep asking that, and I told you I take them and don't know when I take them really. I might have my hand in my pocket and just flip one in my mouth and not even realize. Q. And these were the Black Bombers? A. Right. Q. You didn't have any Christmas Trees? A. I might have had some Christmas Trees. I really couldn't tell you for sure. Somebody might have given me some during the day, that I met, and I don't even remember getting them from him.

He said he ate another steak dinner around 9:30, and may or may not have had drinks with this meal and could not remember if he took any more pills after dinner. He probably did but may not have, testifying:

> I cannot remember. I might have taken two or three pills, if I had them in my coat pocket. I probably did.

He professed to have no recollection of any events after that, testifying on cross-examination:

> Q. What is the last thing you remember? A. Going back up to the Fifth Amendment and listening to the music, and that is when I remember taking an LSD pill, at least I think I did, because I didn't have it on me when they searched me. I think I lost it. I remember putting something in my mouth, and I think it was the LSD pill, because I had it in my mind in a sort of a trip. I was just on a trip, and the next thing I knew I threw it in my mouth. The reason I think it was the LSD pill is that it was purple or lavender color, and I had thought about shooting it. Q. I thought you indicated that you tried to shoot it. A. Tried and thought is the same thing. Remembering or thinking I tried to shoot the pill is the thing. Q. Do you remember which? A. I had a spoon.

He recalled that he took the LSD into the lavatory, attempting there to inject it into his veins with a needle and an eyedropper, and, failing this, swallowing the drug. The LSD, he said, he got from a friend at The Fifth Amendment. He said he had no idea how many drinks he had had that day.

Defendant specifies in the brief his 4th, 7th and 8th assignments of error as follows:

> 4. The Court erred when it refused the appellant's motion to dismiss Count 7, which charged the appellant with first degree murder, the ground for the motion being that the evidence negated appellant's ability to form the specific intent requisite to the crime.
>
> . . .
>
> 7. The Court erred when it ruled that the psychiatrists, based upon hypothetical questions could not answer the legal question as to whether or not the appellant could form a specific intent to commit the specific crimes charged.
>
> 8. The Court erred when it refused to allow the psychiatrist to answer any question as to whether the appellant was sane under the right-wrong test.

Some aspects of these assignments have been discussed earlier in connection with the court's denial of the motion to dismiss for want of intent and the withdrawal of the insanity issue from the jury. The main point now under

consideration concerns the accused's offer to prove by opinion evidence his inability to form a criminal intent to commit the crimes charged.

Tyler's testimony is the only evidence in the record supporting his defense that he could not form a criminal intent. Otherwise, the record is devoid of any proof that he consumed any drugs and liquor whatever within a relevant period preceding and during the commission of the acts charged in the information. The three assignments of error thus necessarily involve the defendant's own testimony as to the identity, strength, dosage and intervals of taking the drugs and alcohol he said he had consumed during the day preceding and the day of the commission of the crimes charged.

In summary, defendant in these assignments urges error because the court failed to find as a matter of law that the evidence "negated appellant's ability to form the specific intent requisite to the crime"; in sustaining objections to hypothetical testimony whether "appellant could form a specific intent to commit the specific crimes charged"; and in refusing to allow the "psychiatrist to answer any question as to whether the appellant was sane under the right-wrong test." Since these assignments coalesce to a large degree to evoke inseparably linked doctrines, we will discuss them together.

[7, 8] Issues of fact, including that of intent, when supported by substantial evidence must be resolved by the jury and not the court. There was abundant evidence in this record to sustain a finding of criminal intent as to each crime charged and a conviction on each count. And there was virtually no dispute or conflict in the proof as to the defendant's complicity in each of the crimes. If the claims of error are meant to question the adequacy of the proof, they come within the rule that a challenge to the sufficiency of the evidence, including proof of the intent with which an act is done, admits the truth and all inferences which can be drawn from the evidence and requires that all of the evidence be interpreted in a light most strongly against the challenger and most favorably to the opposing

party. *State v. Woody*, 73 Wn.2d 179, 437 P.2d 167 (1968); *State v. Reynolds*, 51 Wn.2d 830, 322 P.2d 356 (1958).

Whether the accused committed the acts charged and his intentions in doing them, were issues of fact to be resolved by the jury. The intention with which an act is done, of course, may be inferred from the act and circumstances surrounding it. *State v. Shelton*, 71 Wn.2d 838, 431 P.2d 201 (1967); *State v. Willis*, 67 Wn.2d 681, 409 P.2d 669 (1966); *State v. Mitchell*, 65 Wn.2d 373, 397 P.2d 417 (1964). In its instruction, the court properly reduced each count to its component elements and told the jury that each element had to be established to the satisfaction of the jury beyond a reasonable doubt and that, if the jury entertained a reasonable doubt concerning any one of the elements, it would be its duty to return a verdict of not guilty as to that count. Then, on the matter of intent, the court charged in instruction No. 9:

> As used in the information in said cause and these instructions, "willfully, unlawfully and feloniously" means intentionally and purposely, but not accidentally, and without and beyond the authority of law.

The jury was thus charged as a whole that the state had to prove beyond a reasonable doubt that the defendant intentionally and purposely committed the crimes charged or else acquit him as to any count where they were not satisfied beyond a reasonable doubt of a criminal intent. Defendant took no exception to this instruction nor does he contend that it is erroneous or improper.

He did take exception to the court's failure to use the word *specific* as a modifier whenever the word *intent* was used in the instructions, but we think that this word would add little to the instruction, and its omission would not be reversible error. And as to the charge of murder in the first degree, count 7, the court, after defining its component elements, instructed that the state had to prove each element beyond a reasonable doubt, explaining, however, that the crime could be committed either by shooting with a premeditated design to effect death or without such premeditation while in the commission, attempt to commit, or

withdrawing from the scene of an attempted robbery. It defined and explained, too, what is meant by premeditation. The court instructed on murder in the second degree and manslaughter, and charged that, if the elements of either of these lesser crimes were proved beyond a reasonable doubt, the jury could and should return a verdict as to whichever of the lesser offenses it found proved.

Then, after instructing the jury that the issue of insanity and mental irresponsibility had been withdrawn from their consideration, the court fully instructed the jury, we think, on the extent to which the state of voluntary intoxication from alcohol or drugs could be considered as a defense:

Instruction No. 6 stated:

> According to the statutes of the State of Washington, no act committed by a person while in a state of voluntary intoxication from alcohol or drugs shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such purpose, motive or intent. If a person is intoxicated to such a degree that he is not capable of forming a specific intent to commit a crime, he cannot be guilty of any crime of which a specific intent is a necessary element.
>
> This statute is not designed to give immunity to persons who commit crime when they are affected by intoxicating liquor or drugs. You must discriminate between the conditions of mind merely excited by intoxicants, and yet capable of forming a specific intent to commit a crime, and such a prostration of the faculties as renders a man incapable of forming the intent. If an intoxicated person has the capacity to form an intent to commit the crime charged and conceives and executes such an intent, it is no defense that he was induced to conceive it, or to conceive it more suddenly, by reason of his intoxication.

All in all, the court gave 36 instructions running to 40 pages of the statement of facts.

As earlier noted, the court did receive the defendant's detailed testimony concerning his taking drugs and liquor and their effect on him and his asserted loss of memory during the intervals of the crimes. And the court did admit

extensive psychiatric testimony as to the effects these drugs and liquor generally produce. Objections were sustained, however, to the offer of the psychiatrist's opinion that the defendant, at the time of the commission of the offenses charged, was incapable of forming a criminal intent to commit the crimes charged in the information.

The evidence as to the defendant's voluntary consumption of drugs and liquor was received in accordance with RCW 9.01.114 to be considered by the jury in determining the intent, design and premeditation with which the acts charged were done,[1] for this statute expressly allows the jury to take such evidence into consideration in determining purpose, motive or intent. *See* instruction No. 6, *ante*. Insanity induced by voluntary intoxication is no defense to crimes involving intent and purpose. *State v. Beaman*, 143 Wash. 281, 255 P. 91 (1927); *State v. Huey*, 14 Wn.2d 387, 128 P.2d 314 (1942); *State v. Bower*, 73 Wn.2d 634, 440 P.2d 167 (1968). RCW 10.76.010, RCW 9.01.114.

Defendant now contends, however, that, in addition to the hypothetical opinion given as to the effects of certain drugs generally, the doctors should have been allowed to express their opinions that, from defendant's description of the drugs taken, he could not have formed an intent, or, as he puts it, a specific intent to commit the crimes charged.

[9] His position on this point, we think, is unsound and unsupported by the authorities. To allow the doctors to express their hypothetical opinions as to the intent or lack of it with which certain described acts were done, when the record does not contain reasonably definite and explicit facts upon which to base such opinions would effectually permit medical experts to usurp one of the vital functions of the jury. It would allow the doctors to convey their opinions as to ultimate facts in cases where the record does

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[1] "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such purpose, motive or intent." RCW 9.01.114.

not contain sufficient facts upon which an opinion can reasonably be stated.

The two psychiatrists whose opinion testimony was offered had no reasonable medical knowledge of the quantities of cocaine, amphetamines, Dexamyl, marijuana and LSD or the strengths and dosages of any of them or the intervals in which they were taken upon which to form a reasonable medical opinion. They had not examined the accused during a relevant time before or after the occurrence of the acts charged. They had no facts before them upon which their opinions could with reasonable medical certainty be based. The doctors could and did, as earlier noted, express their general opinions as to the physical and mental effects of drugs and alcohol under the statute (RCW 9.01.114) which permits a jury to consider voluntary intoxication with respect to the matter of intent or purpose, but had no foundation in the evidence upon which to render with reasonable medical certainty an opinion as to his mental condition and state of mind during the time when the crimes were committed. These offered opinions were, therefore, properly excluded as being speculative, argumentative and the unsupported expression of opinion as to an ultimate fact in issue.

For example, Dr. Ogle, a psychiatrist, did testify extensively concerning the general effects of drugs upon a person. Objections were sustained, however, to questions intended to elicit his opinion as to the defendant's mental state immediately prior, during and following the commission of the acts charged, for the doctor had not examined the defendant within a relevant period of the acts charged and he did not know within reasonable latitude the kinds, amounts, dosages or intervals in which the drugs were claimed to have been consumed by the accused. The record, consequently, supplied the doctor with no basis in fact upon which he could render his opinion with reasonable medical certainty as to the defendant's mental state. The speculative quality of his observations, although referring more particularly to the right and wrong test rather than the more precise issue of intent, may be seen in his testimony on cross-examination concerning the defendant:

Q. His inability to distinguish the moral qualities of the act and his inability to distinguish between right and wrong with respect thereto, is that based upon his consumption of these drugs? A. In the hypothetical case presented the disorganizing effect and the inability to distinguish what action was being done, and the matter of right and wrong in it, which might have been done, in effect, in my estimation would be related to the taking of the drugs. Q. And take away the drugs, the hypothetical man, I take it, would be able to appreciate the moral qualities of his act in the normal course of events and appreciate the difference between right and wrong with respect to his normal conduct? A. That is my belief. Q. And the same is true with respect to his ability, reality contact in the normal course of events, absent the drugs; is this person normally in contact with reality? A. It is my belief that this person would normally be in contact.

The doctor's opinions both as to the right or wrong test or the defendant's state of mind during the period of the crimes charged were therefore properly excluded.

Dr. Hurley, the other psychiatrist called by defendant, had not examined the defendant during a time relevant to the time of the crimes. He testified to the general effects of dextroamphetamines, biphetamines, methedrine, cocaine, LSD, and alcohol on the human system and personality. But the doctor could connect this evidence to the defendant no more specifically than to say that the reaction to combining dextroamphetamine, biphetamine, LSD and cocaine in one person at the same time would depend on the amount of a person's tolerance to it. Dr. Hurley testified: "In relatively small doses he might appear to be merely hyperactive, hyperalert, tense, jittery, or he could actually become psychotic," adding, "Well, if it hadn't been for the LSD, there might not have been any unusual effect, but the LSD could have shattered his personality to the point where he was clinically insane."

On cross-examination, Dr. Hurley said that, if the defendant had taken the amounts of the various drugs he had said he had taken, it might well have been a fatal dosage. Dr. Hurley stated that even a large amount of amphetamine does not take away the capacity to know what one is doing, that patients who have taken even large amounts

know they are sick and voluntarily seek out a doctor. The drugs, he said, do remove normal caution, but one genuinely under the influence of narcotics would not ordinarily try to conceal a crime, or require a cab driver he was going to rob to pull into a garage, or remove a billfold because it has fingerprints on it. The doctor could not and did not say that the defendant was insane at the time of the acts charged. His opinions as to the defendant's intentions or state of mind in committing the acts charged were entirely speculative and conjectural and could not be stated with reasonable medical certainty. Objections to them were properly sustained.

Ordinarily a witness must testify as to facts within his personal knowledge and cannot express his opinions. Experts in a given science, art, profession, skill or calling, however, may state their opinions on subjects in which they have acquired special knowledge or proficiency and which opinions are based on facts established with reasonable certainty in the record. Hypothetical questions must, therefore, rest on facts in the record; they cannot be founded on speculation and mere conjecture. 31 Am. Jur. 2d *Expert and Opinion Evidence* § 56 (1967). Here the defendant's testimony concerning the kinds, quantities, strengths and intervals of taking the drugs and alcohol was so vague, indefinite and uncertain that no competent medical opinion could be legally expressed as to the effect they had on him at a given time and place; nor could it be stated with reasonable medical certainty whether the accused was incapable of forming an intent to commit the crimes whereof he stood charged at the time of their commission. *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 381 P.2d 605 (1963). Since the doctors had not examined the defendant within a relevant period of time and were not at the scene of any of the crimes, they had no testimonial knowledge of his mental state or condition at the times when the crimes were committed. Their opinions thus came within the rule of *State v. Farley*, 48 Wn.2d 11, 290 P.2d 987, *cert. denied*, 352 U.S. 858, 1 L. Ed. 2d 65, 77 S. Ct. 79 (1955-56), where, as here, the defendant sought to rebut the inference of premeditation and intent by having a doctor testify hypotheti-

cally as to the accused's mental reaction at the time of the commission of the crime. This court, denying the accused's contention, said, at 20:

> Since the doctor was not present at the murder, he had no testimonial knowledge of appellant's appearance, statements, acts, and demeanor, or the circumstances surrounding the crime. His diagnosis of appellant's state of mental health, as revealed by subsequent examinations, cannot be related to the particular instant of the crime.

> "The intent with which an act is done is a mental process, and as such generally remains hidden within the mind where it is conceived, and is rarely, if ever, susceptible of proof by direct evidence, but may be inferred or gathered from the outward manifestations, by the words or acts of the person entertaining it, and the facts or circumstances surrounding or attendant upon the offense with which he is charged."

Of similar import on this point are our decisions in *State v. Moore*, 61 Wn.2d 165, 377 P.2d 456 (1963), and *State v. Cogswell*, 54 Wn.2d 240, 339 P.2d 465 (1959).

The doctors' answers to the hypothetical question as to the defendant's state of mind would have amounted to no more than conjecture and speculation, and the court properly excluded the psychiatrist's hypothetical opinion as to whether the defendant could form an intent to commit the crimes charged.

Finally, insofar as it may be contended that the element of intent is connected with the issue of premeditation in count 7, the first-degree murder charge, it should be noted that the defendant was charged in the alternative. The information alleged and there was evidence to support both a premeditated design to effect the death of Ada White, or without design to effect her death, killing her while in the commission of, attempt to commit, or withdrawing from the scene of an attempted robbery. The jury was, we think, properly instructed on this subject. Thus, substantial proof either that the defendant with premeditation killed Ada White, or killed her while intentionally engaged in or withdrawing from the scene of an intentional robbery would be sufficient to warrant a conviction.

> The killing of a human being . . . is murder in the first degree when committed either—
>
> . . .
>
> (3) Without design to effect death, by a person engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a robbery . . .

RCW 9.48.030(3). *State v. Selj*, 80 Wn.2d 62, 366 P.2d 183 (1961); *State v. Burnett*, 37 Wn.2d 619, 225 P.2d 416 (1950); *State v. Miller*, 164 Wash. 441, 2 P.2d 732 (1931). The record contains ample evidence to sustain the verdict on both theories of murder in the first degree.

Accordingly, the judgment is affirmed.

FINLEY, WEAVER, HAMILTON, and McGOVERN, JJ., concur.

ROSELLINI, J. (dissenting)—I agree with the court's disposition of all of the questions presented on this appeal, save one. That is the question whether the trial court erred in refusing to admit the opinion of a psychiatrist concerning the appellant's ability to form the specific intent to commit the crimes charged. The offered opinion was based on the appellant's testimony describing the amount and kinds of drugs and alcohol which he recalled having consumed on the day of the crimes.

The majority says that the appellant's testimony about his activities on the day in question was so vague that no valid opinion could be based upon it. The trial court did not find it that insubstantial. It allowed the witness to give his opinion at some length but would not let him give an opinion on what it termed the "ultimate issue."

It seems to me that the appellant's testimony could be hardly precise and cogent if he did in fact consume a large quantity of stimulants, depressants, and disorienting drugs. But it was the jury's function to weigh this testimony. It is not a proper function of this court. The trial court did not exclude the doctor's opinion because it was based on vague testimony. Its refusal was based solely on its conclusion that such an opinion would be an opinion on the "ultimate question" to be decided by the jury. The trial court thought

that an expert opinion on the "ultimate issue" is inadmissible as a matter of law.

It is clear that the trial court was in error in this. An expert may testify about the mental condition of a defendant at the time of the commission of an alleged crime. *State v. Bridgham*, 51 Wash. 18, 97 P. 1086 (1908); *and see State v. White*, 60 Wn.2d 551, 374 P.2d 942 (1962), at 575-581.

We held in *State v. Alden*, 73 Wn.2d 360, 438 P.2d 620 (1968), that the opinion of a qualified expert, if it will aid the jury in reaching its verdict and will not mislead it to the prejudice of the objecting party, is proper evidence even though it may be an opinion on the "ultimate issue."

The respondent and the majority tacitly recognize the validity of this principle, since they do not offer to support the trial court's ruling on the ground which the court itself gave for making that ruling.

The case cited by the majority, *State v. Farley*, 48 Wn.2d 11, 290 P.2d 987, cert. denied, 352 U.S. 858, 1 L. Ed. 2d 65, 77 S. Ct. 79 (1955), is obviously not in point. There the medical expert was asked to give an opinion regarding the defendant's mental state at the time of the alleged crime. The opinion would have been based solely on the doctor's subsequent examination of the defendant. The case does not hold that a psychiatrist cannot give an opinion concerning the mental condition of a defendant at the time of an alleged crime, based upon the testimony of the defendant concerning his acts and other conditions which may have affected his mental state. An expert opinion based on the testimony of a witness is admissible. *State v. McKeown*, 172 Wash. 563, 20 P.2d 1114 (1933).

This is a capital case and the presumption should not be indulged that any error which occurred was harmless error. I am dismayed by implications in the majority opinion that, if this court is convinced by the state's evidence, it will hold the erroneous exclusion of the appellant's offered evidence to be harmless and nonprejudicial. It is not this court which must be convinced of the appellant's guilt. It is the jury. And the appellant was entitled to have the jury consider any relevant, competent, and material evidence which

he offered in his defense, if that evidence was not otherwise inadmissible by reason of some affirmative rule of law.

Here the rule is, as the majority concedes, that intoxication or mental derangement, even though self-induced, is a defense if it renders the defendant incapable of forming the specific intent which the state must prove in order to warrant a conviction.

The appellant offered medical evidence in the form of a psychiatrist's opinion that, if he had ingested all of the substances which he claimed to have consumed on the day of the crimes, he would have been incapable of forming such an intent. That opinion should have been received in evidence, the court having found the doctor qualified to give opinions based on the appellant's testimony, however vague that testimony may have been.

If the appellant's testimony concerning his activities was improbable, the jury could be expected to reject it, and with it, the psychiatrist's opinion based upon it. But it is not for this court to reject it or to say that the state's case was proved beyond a reasonable doubt. It is difficult to imagine that the jury would have found the appellant incapable of forming the intent necessary to commit the crimes which the evidence tends to show he did commit, and I strongly suspect that, if asked the question on cross-examination, the doctor would have testified that if the appellant had been sufficiently drugged to lose the ability to form an intent, he would have been unable also to coordinate sufficiently to do the acts involved in the crimes. However, there is no testimony to this effect in the record. One can only speculate as to how well the opinion would have been tested and how well it would have stood up at the trial. It cannot be said, on the record before us, that the error in rejecting the official evidence was harmless. The appellant was entitled to have the jury consider such evidence as he was able to muster in his own defense.

In my opinion, the refusing of this evidence was prejudicial error and a new trial should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

HERMAN TELFAIR,

Petitioner,

vs.

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
and
LUCKENBACH STEAMSHIP COMPANY, a corporation,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

A

OPINIONS BELOW

The petitioner, Herman Telfair, seeks a writ of certiorari to review the judgment and decision of the United States Court of Appeals, Fifth Circuit, in the case of

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NOTE: All Emphasis Supplied

R: References to Record on Appeal before Fifth Circuit on appeal of Telfair

T: Transcript of trial proceedings in record below.

Herman Telfair, plaintiff-appellant vs. Zim Israel Navigation Company, Limited, a foreign corporation, Defendant, Third-Party Plaintiff, Appellee vs. Luckenbach Steamship Company, a corporation, Third-Party Defendant, Appellee, case no. 27,418, which, among other things, affirmed a final judgment in favor of Telfair, as plaintiff, against Zim Israel.

Telfair, the petitioner here, was seeking reversal of that judgment, and reinstatement of a prior judgment, which had been set aside on a new trial order entered by the trial court, in this unseaworthiness personal injury case.

Copies of the following decisions, opinions and proceedings are appended hereto:

Appendix A — Order of United States Court of Appeals for the Fifth Circuit, dated and entered July 22, 1970, denying Telfair's petition for rehearing.

Appendix B — Opinion and judgment of the Fifth Circuit, affirming the judgment, dated June 19, 1970.

Appendix C — Order of United States District Court in and for the Middle District of Florida, denying motion of plaintiff Telfair for new trial.

Appendix D — Final judgment in favor of Telfair in amount of $50,000.

Appendix E — Order of United States District Court in and for the Middle District of Florida, granting motion of Zim Israel for new trial after first verdict and judgment.

Appendix F — Motion of Zim Israel for new trial after first trial.

Appendix G, H — Judgment for plaintiff, Telfair, against Zim Israel, in amount of $123,285.00 after first trial.

Appendix I — Jury verdict for Telfair after first trial in amount of $123,285.00.

B

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The opinion and judgment of the United States Court of Appeals, Fifth Circuit, was dated June 19, 1970. (Appendix B). The petition for rehearing was denied, July 22, 1970 (Appendix A). Jurisdiction is invoked pursuant to 28 U.S.C., §1254(1); and 28 U.S.C. 2101(c); and Supreme Court of the United States, Revised Rules, effective July 1, 1970, Rule 19(1)(a) and (b); Rule 21; Rule 22(3).

C

QUESTION PRESENTED FOR REVIEW

WHETHER A LONGSHOREMAN, PRIOR TO ENTERING THE HOLD OF A SHIP ON A RUNG LADDER, OWES A DUTY OF CARE

TO HIMSELF A) TO SEARCH FOR AND DISCOVER GREASE ON A RUNG, WHERE THERE IS NO EVIDENCE THAT THE GREASE IS VISIBLE FROM THE DECK; OR B) TO WATCH A CO-EMPLOYEE GO DOWN THE LADDER IN ANTICIPATION OF AN UNSEAWORTHY LADDER.

D

STATUTES AND CONSTITUTIONAL PROVISIONS, TREATIES, ORDINANCES, AND REGULATIONS INVOLVED

NONE INVOLVED.

E

STATEMENT OF THE CASE

I. Proceedings In Trial Court

a) On December 1, 1966, the petitioner, Herman Telfair, a Florida citizen, filed an action at law in Circuit Court in and for Hillsborough County, Florida, against the defendant-appellee, Zim Israel Navigation Company, Limited, an Israeli Corporation. In his complaint, the plaintiff, a longshoreman, alleged that he slipped on grease on an access ladder while working aboard the defendant's ship, THE MAZAL, in May, 1966, at the Luckenbach Terminal in the Port of Tampa, and sustained severe and permanent personal injuries. The complaint was framed in two counts; i) negligence, and ii) unseaworthiness. Damages in excess of $50,000 were sought and trial by jury demanded.

b) On December 22, 1966, the defendant, (the respondent here) Zim Israel, removed the case to the United States District Court in and for the Middle District of Florida on diversity grounds. Zim Israel also answered and interposed, inter-alia, general denials and an affirmative defense of contributory (or comparative) negligence.

c) In May, 1967, Zim Israel filed and served its third-party complaint against the stevedore company, Luckenbach Steamship Company, a non-Florida corporation, contending that if the plaintiff was injured as alleged in the complaint, the stevedore would be ultimately responsible and at fault, and would be obliged to indemnify Zim Israel for plaintiff's damages, plus costs, expenses and attorneys fees incurred. The third-party defendant answered, on May 31, 1967, denying responsibility and alleging inter-alia, contributory negligence of the plaintiff.

d) After extensive discovery, the cause proceeded to a complete and thorough trial before Honorable Joseph P. Leib and a jury on March 25-27, 1968. The trial court, at the conclusion of all the evidence, granted the plaintiff's motion for a directed verdict on the defense of contributory negligence for absence of evidence.

e) The case was submitted to the jury on theories of Zim Israel negligence and unseaworthiness. A verdict was returned in favor of the plaintiff on the unseaworthiness count in the amount of $133,385.00, and in favor of Zim Israel on the negligence count. Judgment was entered in favor of the plaintiff on the verdict on March 27, 1968.

f) On April 4, 1968, Zim Israel filed post-trial motions for judgment in accordance with its trial motion for directed verdict, for remittitur and for new trial. Numerous memoranda were filed and by order dated May 27, 1968, the trial court denied the motions for judgment N.O.V. and for remittitur, but granted the motion for new trial. In its order the court said in relevant part:

> "The court finds that there was sufficient evidence to have permitted the jury to consider the issue of the contributory negligence of the plaintiff." (Appendix E).

g) A second trial was had, and a jury verdict in favor of the plaintiff in the amount of $50,000 was returned. Judgment was entered thereon on October 22, 1968. The plaintiff moved for a new trial by motion dated October 28, 1968. The motion was denied by order dated November 22, 1968.

II. Appellate Proceedings

a) In the meantime, the trial court had under advisement the third-party claim. The plaintiff, however, filed an appeal on December 20, 1968, from the judgment of October 22, 1968, urging in its statements of issues that the trial court had erred in granting Zim Israel's new trial motion, after the first trial, thus depriving plaintiff of his $133,385 verdict and judgment.[1]

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[1]The appeal was protective in nature, since counsel for the plaintiff was uncertain as to finality of the October 22, 1968 judgment, for appellate purposes, since the third-party claim was still pending; see Rule 54 (b), Federal Rules of Civil Procedure, but in no event wanted the appeal time to expire if the judgment of October 22 were final.

b) Thereafter, on February 26, 1969, the trial court entered judgment in favor of Zim Israel and against Luckenbach on the third-party claim, with findings of fact and conclusions of law. However, the court reserved ruling on costs and attorney's fees. On March 7, 1969, Luckenbach filed post-trial motions, including motion for new trial on the third-party claim.

c) On April 9, 1969, the post-trial motions of Luckenbach were denied, and on application of Zim Israel, attorney's fees were assessed in the amount of $20,000 against Luckenbach.

d) At this juncture, the plaintiff filed a new appeal, on April 23, 1969, on the theory that the order of April 9, 1969, finally disposed all of the rights of all of the parties, and finally disposed of the indemnity claim including attorney's fees, and that in any event, the time for appeal by any party commenced to run only on April 9, 1969, under the provisions of Rule 54(b) of the Federal Rules of Civil Procedure. On the new appeal, the petitioner, Telfair raised the precise same point as he did on the prior appeal.

e) By order dated May 6, 1969, the 5th Circuit granted the motion of the plaintiff-appellant to consolidate his two appeals, and to use the records on appeal interchangeably, on the grounds that one of the two appeals was appropriate and one inappropriate.[2]

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[2]Yet another appeal was involved. By notice dated April 30, 1969, the third-party defendant has appealed, challenging the indemnity judgment against it, in favor of Zim Israel, entered upon the second trial. That issue is not involved here.

On either or both appeals, however, one issue was properly presented, that is; whether the trial court erred in granting the new trial on the ground that it did, after the first trial. The plaintiff urged that it did err. In short, the plaintiff challenged the new trial order, and sought reinstatement of his original verdict and judgment against Zim Israel in the amount of $133,385.00, plus costs.

f) As we have seen, the Fifth Circuit affirmed, finding that a question of fact existed on the issue of contributory negligence — or more accurately the comparative ngeligence — of Telfair on the record at the first trial. Petition for rehearing was denied, and this petition followed.

III. The Trial Testimony

The petitioner believes, of course, that the trial court was eminently correct in directing a verdict and striking the defense of contributory or comparative negligence at the conclusion of all of the evidence at the first trial and claims that the record shows no violation whatsoever of any duty which a longshoreman owes to lookout for his own safety, in a case like this, involving maritime or admiralty principles. The petitioner contends that the question is one of Federal Maritime law and that the trial court erred in granting Zim Israel a new trial on the ground that there was evidence of contributory negligence sufficient to submit the issue to the jury. The plaintiff, of course, simply seeks reinstatement of his judgment for $133,385.00.

Since it seeks to support the direction of a verdict on the issue of contributory negligence, the plaintiff concedes that the evidence at the first trial must be viewed in the light most favorable to Zim Israel on the issue of contributory negligence, with all permissible inferences drawn in its favor, and all conflicts in the evidence resolved in its favor.

So viewed, the record reveals:

a) Zim Israel, an Israeli corporation, was the owner of the Mazal in May, 1966. On the voyage in question, a cargo discharge in Miami, Florida, was completed at approximately 2:00 A.M. on May 3, 1966. The vessel then set out for Tampa, and arrived at the Tampa docks on the morning of May 4, 1966.

b) The hatches had been closed in Miami, after the stevedores had departed, and were opened in Tampa at approximately 12:45 P.M. on May 4.

c) The plaintiff, Herman Telfair, was a longshoreman for Luckenbach, the third-party defendant. He was a "header"—in essence, the foreman of a 14 man crew of longshoremen.

d) Sometime in the vicinity of 1:00 P.M. or shortly before, the plaintiff's crew was directed to the MAZAL by the stevedore to unload the cargo in the number 4 hatch.

The plaintiff's group then "rigged" the booms—the burdenfall and mainfall—and made ready to proceed into the hold to discharge the cargo.

e) The longshoremen "pullers" then proceeded down a ladder to the upper "tween deck", but before going further into the ship, to the cargo area, had to move some beams which were blocking the way.

f) Three witnesses testified as to events that transpired immediately thereafter. A detailed analysis of their testimony follows:

i) George White, Jr.

After the booms were rigged, the longshoremen went down one level and removed the beams (T. 112-114). The plaintiff, as "header," then directed the men to go on down (T. 115). At this juncture, White, a longshoreman for 25 years (T. 106-107), was standing right at the hatch leading to the ladder down to the next level or lower "tween deck" (T. 132-133). The plaintiff likewise was there, but was standing at the opposite side of the ladder (T. 133).

Robert Beam, known as "Boze", was closest to the ladder, so he began his descent. Then the plaintiff got on the ladder behind him (T. 115-116, 117). The witness, White, was standing right at the hatch (T. 116), watching "Boze" go down (T. 117). White saw "Boze" slip; "when he slipped", White thought "Boze" simply had made a misstep (T. 116, 117). When Boze reached the cargo, he went on ahead, and when White looked again he saw the plaintiff slip (T. 117).

The cargo extended upward, so when "Boze" stepped off, he actually stepped onto the cargo, and at this point, the plaintiff, Herman Telfair fell. When Mr. Telfair fell,

he called back up to White and told him to hold it; he warned the men to "be careful" coming down the ladder; and said: "There is something on that ladder. I done slipped and fell and hurt myself". (T. 118-119, 120). The next longshoreman on the ladder was Charlie Hawkins; and he continued down after Telfair's warning. Next down was "Bobo", Elwood Favors (T. 120).

When the witness White, proceeded down the ladder, he determined that there was grease on it; he testified that "some of it got on my hands". He could not be sure as to how many rungs had grease on them, but was certain that there was grease on at least one of them (T. 119). White showed the grease to the plaintiff and remarked: "No wonder you slipped". The grease was dark (T. 119, 122).

"Bobo" (Elwood Favors), also remarked that he had gotten grease on his hands (T. 121), and showed it to White (T. 123). White did not talk to Hawkins (T. 121). In the meantime, the plaintiff was laying on the cargo boxes (T. 121). White did not observe any of the ship's crew precede the longshoremen down the ladder (T. 122).

On cross-examination, White reiterated that he actually had seen the plaintiff slip. The plaintiff's head was below the deck when the accident happened (T. 130-131). White could see the ladder from where he stood as "Boze" went down. When "Boze" slipped, White thought it was simply a misstep. The plaintiff had been standing next to White, on the opposite side of the ladder. White did not know if the plaintiff was watching "Boze" or where the plaintiff was looking (T. 133). "Boze" said nothing when he slipped, but just continued on and White thought it

was a misstep. After Telfair's accident. Boze said: "I slipped on that ladder", and White remarked that he thought it was a misstep (T. 135-135). When White saw Boze slip, White said nothing to the plaintiff (T. 135-136).

White did not slip on the ladder; but he did get grease on his hand. The rest of the men went down. Mr. White climbed down the ladder facing it. As far as White knew, only "Boze" preceeded the plaintiff down the ladder that day (T. 137).

On redirect, this longshoreman, with 25 years of experience, described how one descends a ladder like the one involved. He described how a longshoreman takes hold of the handhold and then starts down. He testified that he did not put his hand in grease purposely.

His testimony, verbatim, follows:

> Q Mr. White, did you put your hand in that grease, the grease that you got on your hand—did you put your hand in that grease on purpose?
>
> A No, sir.
>
> Q Why did you put it there? Why did you get it on there?
>
> A You can't see—you know, when you are going down a ladder like this here, you see, if you start with this hand, you come down like this here (Indicating)—well, my right hand, it don't touch the same rung of the ladder my left hand do.

Q Let me ask you this. Will you step over here and show the jury how you go down one of these ladders? I suppose you go through a manhole first; right?

A You go like this here. Like this is the hatch, you go down this one, then you got to walk a little piece about as far as from here. There is a handhold here you can catch as you start down this ladder. (Indicating)

Q What do you do as you step into that hold? Do you grab hold with your hand?

A Grab hold and go right on down the ladder.

Q Do your feet get to the rungs of the ladder before your eyes do, as you are going down?—I guess so; is that right?

A That's right.

Q So as you go down the ladder, you are facing the rungs, and where are you looking as you go down?

A You are looking at the wall.

Q Just looking ahead at the wall?

A You know, the back of the ladder.

Q Right. This part right in here? (Indicating)

A Yes.

Q So you would be going down this ladder facing this way, and hand over hand down?

A Like this here. Your hand catches every other ladder. (Indicating)

Q Your hand catches every other rung?
A That's right.

Q All right. Now, as you go down, is there any way for you to see grease on the ladder, if it is there?
A No.

Q —As you are going down?
A No.

Q One more thing. As you were standing up in the area right above where the accident took place, and you looked down and you saw Boze or Robert Beam—you said you thought it looked like a misstep—why didn't you say anything to Herman?
A I thought he made a misstep.

Q Had Herman already yelled up to you before you started down the ladder that there was grease on the ladder?
A Yes, sir. (T. 138-140) (Emphasis Supplied).

He further testified, over defense objection, that he, White, did not slip because Herman had already told them "to watch out"; that after Herman hollered up to him, he did not look down on the rungs as he proceeded, though he tried the best he could, but could not see, and that "you can't look down under your foot". (T. 141). He came down the ladder supporting himself and his weight by his hands, not feet (T. 141). White observed grease only on his hands; he did not look at his shoes. He saw no grease on the deck prior to arriving at the ladder, and slipped on nothing before arriving at the ladder (T. 142).

ii) Herman Telfair

The plaintiff, 45 years of age, had worked as a longshoreman for over 20 years. He had been a "header" for approximately 10-11 years prior to the accident. On the day of the accident, the stevedore directed the plaintiff and his men to the MAZAL (T. 153, 163), and they boarded the vessel and rigged the booms (T. 164-166; 172-175). The men then descended down one level and moved some beams (T. 177-178). A crew man from the ship watched. (T. 179-180). The beams were moved on the upper "tween deck", and "Boze", who was closest to the hatch, began to descend the ladder to the lower "tween deck" (T. 181).

The plaintiff got on the ladder right after "Boze" and did not see him, and did not hear "Boze" say anything. The plaintiff testified, with reference to his own descent behind "Boze" as follows: "And usually when you are going down, you don't hardly look down like that. (Indicating). You just go down normally, you know" (T. 181). Boze got off the ladder, on the boxes, and the accident happened (T. 181).

The plaintiff's feet slipped just before he reached the cargo; he attempted to catch hold, and struck his knee; he came down three or four more steps, swung around, and yelled a warning back up to the other men. He then lay down, as the other men came down (T. 182).

The plaintiff got some grease on his pants where he hit, and a bit on his hand. He did not look to see if he had any on his shoes (T. 182). The ladder to the upper "tween deck" was the same kind of ladder as the one

on which he slipped; vertical with round rungs (T. 183). He did not slip on the first ladder (T. 183). Nor did he slip on deck or see any grease on deck or on the gangway (T. 184). The incident was reported to the stevedore (T. 184-185). White and Bobo (Favors) came down and said: "Yes, we got grease on our hands". (T. 186).

On cross-examination, the plaintiff specifically located the scene of the accident; it occurred at the forward end of hatch four on the ladder between the upper "tween deck" and the lower, about ½ way down the ladder (T. 208). The plaintiff was holding the ladder with his hands, coming down, when his right foot slipped (T. 208). He relinquished his hold on the ladder, then dropped, and recaught the ladder, and hung a bit. As he slipped, his right knee struck one of the rungs. This occurred about 1:15 P.M. (T. 209-210).

Boze told him he also had slipped (T. 210), but the others came down without slipping, after the warning by the plaintiff (T. 210).

On redirect, it was again pointed out that Boze told Telfair about Boze's slip after Telfair fell (T. 211).

iii) Robert Beam

Beam was a longshoreman who had worked under Telfair since 1951. On the date of the accident, the men boarded the ship at about 1:00 P.M. (T. 213) The booms were positioned and hatches removed. The men went down to the "tween deck", rolled the beams, and then proceeded to the lower "tween deck" to discharge some freight (T. 213-215).

Beam went down first, and the "header" (Mr. Telfair), came next. As Beam descended, he "slipped" a little bit, but did not fall. He completed his descent, then waited for the plaintiff (T. 216). Telfair came down behind him, and Beam saw Telfair slip, and saw grease on the ladder. It looked like cable grease, used on the booms—a dark thick grease. Telfair had some on his pants (T. 217). The accident was reported to the stevedore (T. 218), but not to the ship's crew (T. 218). After Telfair slipped, he yelled up to the other men to watch out because there was grease on the ladder (T. 219).

On cross-examination, Beam reiterated that he slipped a "little bit" on his descent. On deposition, Beam had said that he did not "slip" (T. 220); but interjected at trial that he meant on deposition that he did not fall. He reiterated at trial that his foot slipped (T. 221).

Likewise, on deposition, Beam had testified that he did not tell Telfair that he, Beam, had slipped; and he stated at trial that he had not told Telfair that he had slipped because he, Beam, did not slip, (T. 222-223). Finally, Beam had said on deposition that he did not see grease on the ladder until after the plaintiff slipped; whereas at trial, he testified he saw the grease prior to the plaintiff's slip, after Beam got into the hold, off the ladder (T. 224-228). He had no trouble descending (T. 229).

g) The parties stipulated that an accident occurred on May 4, 1966, and that Mr. Telfair fell. At trial, the only dispute was as to presence of grease (T. 64). There was testimony from the Chief Officer of the MAZAL that grease on a ladder would be dangerous (T. 42, 78-79), and a stipulation that a marine expert would testify that grease on a ladder, sufficient to make it slippery, is

dangerous (T. 398-399). Finally, there was testimony that graphite grease was used on the screws on "dogs" on the escape hatch, and some was used on the hinges (T. 66-67; 366-67) as well as on the booms (T. 170-173; 217).[1]

F.

REASONS FOR ALLOWING THE WRIT — RULE 19.

Simply put, the plaintiff seeks reinstatement of his original verdict and judgment of $133,385.00. There was no issue of contributory (comparative) negligence at the first trial, and the trial court clearly recognized this when it originally struck the defense and granted a directed verdict on the issue. The trial court erred in reversing its position granting the new trial and the Fifth Circuit erred in affirming.

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[1] The ship foreman on the MAZAL testified that on May 4, 1966, near the end of the work, he sent Telfair back down No. 4 to check on some goods, heard the plaintiff let out a cry, and then spoke to plaintiff who said he struck his knee on a rung coming up (T. 409). This was directly contrary to *his own* written report, signed by him, which described an accident to Telfair "going down" the ladder (T. 411) And it was contrary to his deposition in which he said he heard a sound and just "assumed" Telfair struck his knee (T. 411) This trial testimony is not relevant here, because if the foreman's testimony were believed, and truly reflected what happened, it would not show contributory negligence—but simply no liability, negligence, unseaworthiness or responsibility. It would not show contributory negligence which presumes some liability. In finding unseaworthiness, the jury clearly rejected this testimony.

The medical testimony clearly supported the verdict. The plaintiff, a 45 year old Negro, with wife and children, was compelled to undergo a cartilege removal, and then, because of arthritis, coupled with the torn meniscus, and operation, was compelled to undergo a knee joint fusion or arthodesis, permanently disabling him from work as a longshoreman. His fifth-grade education virtually obliterated his earning capacity, without re-education, which he was attempting. The screws in his knee, and joint-stiffening, caused chronic back problems, which eventually would cause disc problems. His loss of earnings and capacity were huge (T. 230, et.seq.; 313, et.seq.; 294, et.seq.) The trial court itself readily denied the post-trial motion for remittitur.

The evaluation of the conduct of Telfair involves an important and recurring issue of Federal law which has not been, but should be, settled by this Court. It concerns the duty of a longshoreman to "search" for and discover defects or grease on a ladder in a ship's hold, which a visual inspection could not reveal, or to anticipate such dangers and thereby to keep a lookout as others before him transcend the ladder. We believe no such duty exists, and a holding that such a duty does exist goes far to neutralize the beneficial and amelioratory doctrine of unseaworthiness.

The petitioner also believes that the decision and opinion here generates confusion in the law which should be resolved by this Court; and conflicts — at least in substantial part — with the principles enunciated in the Fifth Circuit cases of **CIA Maritima Del Nervion v. J. Flannagan Ship Corp.**, 5 Cir. 1962, 308 F.2d 120; and **Ð/Sove Skou v. Herbert**, 5 Cir. 1966, 365 F.2d 341; and the Second Circuit case of **Calderola v. Cunard Steamship Company**, 2 Cir. 1960, 279 F.2d 475, cert. den. 364 U.S. 884, 81 S.Ct. 172, which seem to negate any such duty, at least insofar as a stevedore employer is concerned, on an indemnity claim by the ship owner. Those principles should also apply here in evaluating the conduct of the longshoreman.

If reasonable men exercising impartial judgment might differ on the presence or absence of contributory negligence, then quite properly the issue should be submitted to the original jury. But where, as here, a) with all conflicts in the evidence resolved in Zim Israel's favor; and b) with all inferences drawn in its favor on the issue of contributory negligence, and c) with the facts construed most favorably toward a finding of contributory

negligence, reasonable men, acting impartially, still could not differ in their conclusion, and could not find contributory negligence, the situation was appropriate for removal of the issue from the jury's consideration; **Cater v. Gordon Transport, Inc.** 5 Cir. 1968, 390 F.2d 44, 46, cert. den., 392 U.S. 927.

Unseaworthiness obviously existed, as the jury determined. Grease on an access ladder, creating a dangerous and slippery condition, obviously established unseaworthiness and liability on the part of Zim Israel to this longshoreman; see generally, **Calderola v. Cunard Steamship Company**, 2 Cir. 1960, 279 F.2d 475, cert. den. 364 U.S. 884, 81 S.Ct. 172; **CIA Maritima Del Nervion v. James J. Flannagan Ship Corp.**, 5 Cir. 1962, 308 F.2d 120 (involving greasy ladder and defective ladder respectively, with resultant liability to longshoremen; cases however, concerned with indemnity claim of ship owner against stevedore); and there can be no doubt that Zim Israel, as ship owner and operator, was responsible to the longshoreman for breach of the warranty of seaworthiness. **Seas Shipping Co. v. Sieracki**, 328 U.S. 85, 66 S.Ct. 872 (1946).

In cases such as this, predicated upon unseaworthiness, contributory negligence is not a complete bar to recovery of course; but at most, where appropriate, it operates to mitigate damages on a comparative fault basis; **Symonette Shipyards, Ltd v. Clark**, 5 Cir. 1966, 365 F.2d 464, cert. den. 387 U.S. 908, 87 S.Ct. 1690; **Gibbs v. Keisel**, 5 Cir. 1967, 382 F.2d 917; **June T. Inc. v. King**, 5 Cir. 1961, 290 F.2d 404.

However, here, the plaintiff did not participate in creating the dangerous condition, and is not responsible

even in part for its existence; cf., Symonette, supra; Gibbs, supra; and was not on actual knowledge of its existence and did not knowingly expose himself to it, and challenge any obvious unseaworthiness in a careless fashion, cf., Superior Oil Company v. Trahan, 5 Cir. 1963, 322 F.2d 234, 237.

The reasoning of the trial court here, in granting the new trial, must be that a jury properly could find the plaintiff, as a reasonable man, was on constructive notice of the presence of the grease; that is, that in the exercise of reasonable care for his own safety, he should have discovered it prior to his accident and avoided it. The problem is, of course, that the proof, however construed, doesn't support such a determination, even if this type of contributory negligence were a partial defense in a case of unseaworthiness, which the plaintiff does not concede.

There was no proof that the grease was visible from the upper "tween deck". There was no proof that the plaintiff observed "Boze" slip (if indeed he did slip). There was no proof that anyone could see the grease on the ladder prior to descending it. The only testimony on visibility is from one witness, who could see it on the ladder from the lower "tween deck" after descent.

There is no testimony from which reasonable men could conclude that Telfair, as a reasonable man, exercising ordinary use of his senses and ordinary care, could have discovered the grease prior to his slip, nor is there even such a permissible inference on this record. He had no warning or indication that anything was wrong on the ladder.

White did not see grease prior to his descent, although he could see the ladder and watched "Boze" descend. White did not purposely put his hand in grease, yet he got some on his hand. The direct testimony of White was that there was no way to see the grease while on the ladder.

There was no proof that the plaintiff ever saw the grease before he fell; or that "Boze" (Beam) did, prior to his slip (if he slipped), or prior to his arrival on the lower "tween deck". Nor was there proof that Bobo (Favors) could see the grease until he got it on his hands.

White did not slip because he was warned (T. 140-41). He came down with weight on his hands (T. 141). He knew there must have been grease on the rung only because some got on his hands (T. 119).

There, of course, was no proof that the plaintiff was warned of presence of grease prior to his fall. The record reveals that others following him did not slip after the petitioner warned them. There was not an iota of testimony that the grease was visible from the top "tween deck", or even while descending; nor was there any proof that it would be reasonable to look at one's feet at the rungs below as one descended; the proof was to the contrary—a longshoreman would look straight ahead on descent and could not see down below his feet anyway, and that grease on the rungs was not visible while descending.

This is not a case of visible defect on a flat walking surface. It is a case of grease on a ladder rung in the depths of a ship. It is a case in which not one longshoreman saw the grease as he descended — but several got it on their persons during descent. And the only person who saw it on the ladder was already on the lower "tween deck".

The witness White did not see the grease, although he was watching "Boze" (Beam). He was unaware of its presence until Telfair warned him after Telfair slipped. Nor was there any indication Favors (Bobo) saw the grease prior to descent or while on the ladder. Nor did Beam see it until he reached the lower deck.

There was a void, then, of evidence of visibility of grease to Telfair before he slipped; of warning to him; of notice to him; and of ability to see grease prior to descending or while descending in the proper manner, or of visibility from the ladder in any event; and a void of any proof that he had any reason at any time to apprehend danger, or to search for grease; thus the trial court properly took the issue of contributory negligence from the jury in the first instance.

This is not purely a request for a factual review. It is an application for enunciation of principles concerning the duty of a longshoreman to look out for his own safety. The petitioner claims no such duty arose here, and, in any event none was breached.

Zim Isreal had its day in court. There was no sound reason given by the trial court for granting a new trial. No reasonable man under appropriate and applicable legal principles could find that the petitioner acted other than reasonably here. $133,385.00 was awarded by a jury. The second trial afforded the petitioner much less, and he believes he is entitled to reinstatement of his original award and judgment. The doctrine of unseaworthiness demands it, and the absence of contributory or comparative negligence demands it.

G

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Fifth Circuit reversed, and the final judgment of the trial court should be reversed and set aside, and the prior final judgment entered after the first trial should be reinstated.

Respectfully submitted,

WAGNER, CUNNINGHAM
AND VAUGHAN
412 Pierce Street
Tampa, Florida

AND

WALTER H. BECKHAM, JR.

AND

PODHURST AND ORSECK
2nd Floor, Concord Building
66 West Flagler Street
Miami, Florida

Attorneys for Petitioner

By _____
WALTER H. BECKHAM, JR.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true copies of the foregoing petition for a writ of certiorari has been mailed to McClain and Turbiville, Marine Bank Building, Tampa, Florida and Glos and Davis, 707 IBM Building, Tampa, Florida, attorneys for Luckenbach Steamship Co.; MacFarlane, Ferguson, Allison and Kelly, 512 North Florida Avenue, Tampa, Florida, and Fowler, White, Collins, Gillen, Humkey and Trenam, P. O. Box 1438, Tampa, Florida, attorneys for Zim Israel Navigation Company, Limited, this ____ day of October ____, 1970.

By _____
WALTER H. BECKHAM, JR.

APPENDIX

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APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 27418

HERMAN TELFAIR,
Plaintiff-Appellant,

versus

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
Defendant-Third-Party Plaintiff-Appellee,

versus

LUCKENBACH STEAMSHIP COMPANY,
Third-Party Defendant-Appellee.

Appeals from the United States District Court for the Middle District of Florida

---

(July 22, 1970)

ON PETITIONS FOR REHEARING

Before WISDOM, GEWIN, and AINSWORTH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby Denied.

APPENDIX "B"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 27418

HERMAN TELFAIR,
Plaintiff-Appellant,

versus

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
Defendant-Third-Party Plaintiff-Appellee,

versus

LUCKENBACH STEAMSHIP COMPANY,
Third-Party Defendant-Appellee.

Appeals from the United States District Court for the
Middle District of Florida

(June 19, 1970)

Before WISDOM, GEWIN, and AINSWORTH,
Circuit Judges.

WISDOM, Circuit Judge: **Seas Shipping Company v. Sieracki**, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, extended the warranty of seaworthiness to longshoremen.

Ryan Stevedoring Company v. Pan-Atlantic S.S. Corporation, 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133, shifted the liability to the stevedore when it breaches the warranty of workmanlike service. In this longshoreman (Telfair) — shipowner (Zim Israel) — stevedore (Luckenbach) case, Telfair complains of the court's granting a new trial which resulted in a much lower verdict than the verdict in his first trial. We review, first, the district court's decision to grant a new trial because it had originally withheld from the jury the shipowner's defense of contributory negligence and, second, its conclusion that the stevedore breached its warranty of workmanlike service. We affirm the district court's judgment.

I.

On May 4, 1966, Herman Telfair, "header" (foreman) of a longshoreman gang, slipped on a ladder while descending into the hold of the Mazal, a ship owned by Zim Israel Navigation Company, Limited. The injury required first a cartilege removal and then, because of arthritis coupled with the torn meniscus and operation, a knee joint fusion or arthodesis, permanently disabling Telfair from work as a longshoreman. The screws in his knee and joint-stiffening produced chronic back problems which eventually will cause disc problems.

In December 1966, Telfair sued Zim Israel in a Florida state court for negligence and unseaworthiness, alleging that he had slipped on grease on an access ladder. Zim Israel removed the case to federal district court and filed a third party complaint against the stevedore company, Luckenbach Steamship, for indemnity. Both Zim Israel and Luckenbach argued that Telfair had been contributorily negligent.

At the close of all the evidence, the district court granted Telfair's motion for a directed verdict on the issue of contributory negligence. The jury found that Zim Israel was not negligent, but awarded Telfair $133,385 for the Mazal's unseaworthiness. The district court entered judgment March 27, 1968. Two months later, the court granted Zim Israel's motion for a new trial (timely filed), finding "that there was sufficient evidence to have permitted the jury to consider the issue of the contributory negligence of the plaintiff".

At the second trial, the jury awarded Telfair $50,000. The district court denied Telfair's motion for a new trial. The court also entered judgment in favor of Zim Israel and against Luckenbach on the third-party claim. Telfair and Luckenbach appealed.

II.

The precedent is longstanding in this Court that

> A motion for new trial is addressed to the trial judge's discretion. He may grant a new trial if he thinks he has committed error; . . . The exercise of his discretion is not ordinarily reviewable on appeal, though a failure to exercise discretion, or an abuse of it, may be corrected.

Marsh v. Illinois Central Railroad Company, 5 Cir. 1949, 175 F.2d 498, 500; see Stewart v. Texas & Pacific Railway Company, 5 Cir. 1960, 278 F.2d 676, 678. Indeed, "[i]n few, if any, situations is the discretion of a trial judge broader than in granting a new trial". Willitt v. Purvis, 5 Cir. 1960, 276 F.2d 129, 132. Here the district court initially removed

the issue of contributory negligence from the jury, believing there was no evidence on which to submit it. Prompted by Zim Israel's motion, however, the district court upon further consideration concluded that he should have allowed that issue to go to the jury. Consequently, he granted the motion for a new trial.

In diversity cases, the question whether sufficient evidence is presented to send a case to the jury is controlled by federal standards in this Circuit. **Boeing Company v. Shipman**, 5 Cir. 1969, 411 F.2d 365, 368-70. **Boeing** directs that a "mere scintilla of evidence" will not prevent a directed verdict, but "if there is substantial evidence opposed to the motions", 'in the light and with all reasonable inferences most favorable to the party opposed to the motion", then the issue should properly be submitted to the jury. Here, Beam, the first longshoreman to descend the ladder "slipped a little bit" but did not fall. Telfair, had he been watching, could have seen him slip as did one of the other longshoremen. Telfair was not watching, however, because he climbed onto the ladder while the first longshoreman was still descending. The seven men who followed Telfair also descended without incident. Testimony shows that Telfair warned them of his accident. But several other individuals used the ladder that afternoon without warning. Although the ladder had not been cleaned, they suffered no mishap. We do not say that contributory negligence was a strong defense. We decide only whether the district court abused its discretion in granting a new trial because it had granted a directed verdict on contributory negligence. We conclude that there was no abuse of discretion.

III.

The district court deferred decision on the indemnity claim until the conclusion of the second trial. The court then held that Luckenbach had breached its warranty of workmanlike service and thus prompted the Mazal's unseaworthiness. Among other things, the district court specifically found that the first longshoreman to descend the ladder slipped but did not fall, noticed grease on his shoe and on the ladder, yet wrongfully failed to warn Telfair. Luckenbach, in its brief, "agrees that if Beam, the first longshoreman to descend the ladder, actually saw grease on the ladder and had sufficient time to warn Telfair, who was immediately behind him, but failed to do so, there would be an adequate basis under applicable law to hold the stevedore liable for indemnity to the shipowner." But Luckenbach attempts to persuade us to reject the district court's credibility determinations in this "shifting, conflicting, and obviously unreliable testimony". Id.

There is no doubt that Beam's story varied from deposition to first trial to second trial. But we are unable to say that the district court accepted the wrong version. And Beam's inability to keep the story straight need not require the conclusion that all versions were erroneous. In short, regardless of our views of the evidence, "[w]e do not retry the case. We may determine only whether the findings pass muster under the clearly erroneous concept of F.R. Civ. P. 52(a), 28 U.S.C.A." Smith v. United States, 5 Cir. 1961, 287 F.2d 299, 301.

> It is well settled that in order for a reviewing court to set aside findings of fact by a trial court sitting without a jury, it must be clearly demon-

strated that such findings are without adequate evidentiary support in the record, or were induced by an erroneous view of the law, and the burden of showing that the findings are clearly erroneous is on the one attacking them.

Chaney v. City of Galveston, 5 Cir. 1966, 368 F.2d 774, 776. Although Luckenbach has perhaps come closer than most, it has not met that burden.

We AFFIRM the judgment of the district court.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27418

D. C. Docket No. Civ. 66-465-T

HERMAN TELFAIR,
Plaintiff-Appellant,

versus

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
Defendant-Third-Party
Plaintiff-Appellee,

versus

LUCKENBACH STEAMSHIP COMPANY,
Third-Party Defendant-
Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that plaintiff-appellant pay the costs on appeal in this Court.

"PerWisdom, C. J."
6/19/70

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

No. 66-465 Civ-T

HERMAN TELFAIR,

Plaintiff,

vs.

ZIM ISRAEL NAVIGATION COMPANY LIMITED, a foreign corporation,

Defendant and Third Party Plaintiff,

vs.

LUCKENBACH STEAMSHIP COMPANY, a corporation,

Third Party Defendant.

ORDER DENYING MOTION FOR NEW TRIAL

This cause came on for hearing upon the Motion of the plaintiff for new trial and the Court, having considered the Briefs and the file in this cause, and having heard counsel for the parties, and being otherwise fully advised in the premises and considering that the Motion for New Trial filed by the plaintiff should be denied, it is:

ORDERED, ADJUDGED AND DECREED that the Motion for New Trial filed by the plaintiff be, and the same is hereby, denied.

DONE AND ORDERED in Chambers at Tampa, Florida this 22nd day of November, 1968.

JOSEPH P. LIEB

UNITED STATES DISTRICT JUDGE

APPENDIX "D"

Judgment On Jury Verdict **Civ 31 (7-68)**

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA — TAMPA DIVISION

Civil Action File No. 66-465 Civ. T.

HERMAN TELFAIR,

vs.

ZIM ISRAEL NAVIGATION COMPANY, LTD.,

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Joseph P. Lieb, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, Herman Telfair, recover of the defendant, Zim Israel Navigation Company, Ltd., the sum of $50,000.00, with the legal rate of interest as provided by law, and his costs of action.

Dated at Tampa, Florida, this 22nd day of October, 1968.

WESLEY R. THIES

Clerk of Court

(SEAL)

By /s/ Carlton B. Epps

Deputy clerk

APPENDIX "E"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 66-465-Civ. T.

HERMAN TELFAIR,

Plaintiff,

vs.

ZIM ISRAEL NAVIGATION COMPANY LIMITED, a foreign corporation,

Defendant and Third Party Plaintiff,

vs.

LUCKENBACH STEAMSHIP COMPANY, a corporation,

Third Party Defendant.

ORDER

THIS CAUSE came on for hearing upon the Motion to Retax Costs and the Motion For Judgment In Accordance With Motion For Directed Verdict, or for Remittitur, or for New Trial.

The Court has heard argument of counsel, considered the briefs and file in this cause, and is otherwise fully advised in the premises.

The Court finds that there was sufficient evidence to have permitted the jury to consider the issue of the contributory negligence of the plaintiff. It is therefore, upon consideration,

ORDERED, ADJUDGED and DECREED:

1. That the Motion to Retax Costs be, and the same is hereby, denied.

2. That the Motion For Judgment In Accordance With Motion for Directed Verdict, or for Remittitur, be, and the same is hereby, denied.

3. That the Motion for New Trial be, and the same is hereby, granted, and the trial will be set down at the Court's earliest convenience.

DONE and ORDERED at Tampa, Florida, this 27th day of May, 1968.

/s/ Joseph P. Lieb

UNITED STATES DISTRICT JUDGE

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE MIDDLE DISTRICT OF
FLORIDA TAMPA DIVISION AT LAW

No. 66-465 Civ. T.

HERMAN TELFAIR,

Plaintiff,

vs.

ZIM ISRAEL NAVIGATION COMPANY LIMITED,
a foreign corporation,

Defendant and Third
Party Plaintiff,

vs.

LUCKENBACH STEAMSHIP COMPANY,
a corporation,

Third Party Defendant.

MOTION FOR JUDGMENT IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT, OR FOR REMITTITUR, OR FOR NEW TRIAL

Zim Israel Navigation Company, Limited, Defendant, moves the Court: (1) To set aside the verdict of the jury and the judgment entered upon it and to enter judgment

in favor of the defendant and against the plaintiff on Count II of the Complaint of the plaintiff, in accordance with the defendant's Motion for Directed Verdict, or, if the foregoing Motion be denied; (2) To grant a new trial in this cause unless the plaintiff consents to a remittitur; or, if the foregoing Motions be denied, (3) To set aside the verdict and the judgment entered on it and grant the defendant a new trial on Count II for the following reasons:

1. The verdict is contrary to the law and the evidence.

2. The verdict is contrary to the manifest weight of the evidence.

3. The Court erred in granting the Motion of the plaintiff to strike the defense of contributory negligence asserted by the defendant and in withdrawing the issue of contributory negligence from the consideration of the jury over the objection of the defendant Zim Israel Navigation Company, Limited.

4. The Court erred in the manner in which it advised the jury that it had decided to withdraw the issue of contributory negligence from the jury, over the objection of the defendant.

5. The Court erred in charging the jury that it was of no consequence how the grease got on the ladder or how long it had been there.

6. The Court erred in overruling the objection of the defendant to the question put to the witness George White "Why did you not slip" and in allowing George White to answer that question.

7. The Court erred in denying the defendant's request that the Court charge the jury in terms or in substance in accordance with the terms of defendant's requested instructions No. 1 through 23.

8. The Court erred in charging the jury in substance in accordance with the plaintiff's requested instructions No. 1 through 43.

9. The verdict of $133,385.00 is grossly excessive, the result of passion, prejudice or mistake, and the amount awarded is so great as to shock the conscience of the Court.

FOWLER, WHITE, COLLINS, GILLEN,
HUMKEY & TRENAM
P.O. Box 1438, Tampa, Florida
Attorneys for Defendant

By: Original signed by D. R. Villareal, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Judgment in Accordance with Motion for Directed Verdict, or for Remittitur, or for New Trial has been hand delivered to Wagner, Cunningham & Vaughan,

412 Pierce Street, Tampa, Florida, attorneys for Plaintiff, and to McClain & Turbiville, 615 Marine Bank Building, Tampa, Florida, attorneys for Third Party Defendant, and to Glos & Davis, 707 IBM Building, Tampa, Florida, attorneys for Third Party Defendant, this 4th day of April, 1968.

Original Signed by D. R. Villareal, Jr.

Attorney

APPENDIX "G"

Judgment on Jury Verdict Civ 21 (7-62)

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA —
TAMPA DIVISION

Civil Action File No. 66-465 Civ. T.

HERMAN TELFAIR,

Plaintiff,

vs.

ZIM ISRAEL NAVIGATION COMPANY, LTD.,
a foreign corporation,

Defendant,

vs.

LUCKENBACH STEAMSHIP COMPANY,
a corporation,

Third Party Defendant.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Joseph P. Lieb, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, Herman Telfair, do have and recover from the defendant,

Zim Israel Navigation Company, Limited, the sum of $132,355.00, with interest thereon at the legal rate as provided by law, plus plaintiff's costs, for all of which let execution issue.

Dated at Tampa, Florida, this 27th day of March, 1968.

Clerk of Court

(SEAL)

By /s/ Carlton B. Epps

Deputy clerk

APPENDIX "H"

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 66-665 Civ-T

HERMAN TELFAIR,

Plaintiff,

vs.

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
a foreign corporation,

Defendant and
Third Party Plaintiff,

vs.

LUCKENBACH STEAMSHIP COMPANY,
a corporation,

Third Party Defendant.

FINAL JUDGMENT

This cause coming on to be heard before the Honorable Joseph P. Lieb, one of the Judges of the above-styled Court, and Oscar V. Montano, foreman of the jury, and eleven other good and lawful men, who being duly sworn according to law, and after having heard testimony and evidence adduced before them, and having heard the charges of the Court, and being fully advised in the premises, and having retired to consider their verdict, returned to open Court and rendered the following verdict:

"We, the jury in the above-entitled cause, find for the plaintiff, Herman Telfair, on Count 2 (the seaworthiness count), and against the plaintiff on Count 1 (the negligence count), and against the defendant, Zim Israel Navigation Company, Limited, on Count 2 (the seaworthiness count) and for the defendant on Count 1 (the negligence count), and assess the plaintiff's damages at the sum of $133,385.00.

So say we all.

Dated at Tampa, Florida, this 27 day of March, 1968.

/s/ Oscar V. Montano

FOREMAN"

It is therefore ORDERED and ADJUDGED that the plaintiff, Herman Telfair, do have and recover from the defendant, Zim Israel Navigation Company, Limited, the sum of $133,385.00, plus plaintiff's costs to be taxed, for all of which let execution issue.

DONE AND ORDERED in Chambers at Tampa, Florida, this 27 day of March, 1968.

/s/ Joseph P. Lieb

U. S. DISTRICT JUDGE

APPENDIX "I"

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

No. 68-465-Civ. T.

HERMAN TELFAIR,

Plaintiff,

vs.

ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
a foreign corporation,

Defendant

VERDICT

We, the jury in the above-entitled cause, find for the Plaintiff, Herman Telfair, on Count 2 (the seaworthiness count), and against the Plaintiff on Count 1 (the negligence count), and against the Defendant, Zim Israel Navigation Company, Limited, on Count 2 (the seaworthiness count) and for the Defendant on Count 1 (the negligence count), and assess the Plaintiff's damages at the sum of $133,385.00.

So say we all.

Dated at Tampa, Florida, this 27 day of March, 1968.

/s/ Oscar V. Montano

FOREMAN

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 855

HERMAN TELFAIR,
Petitioner,
vs.
ZIM ISRAEL NAVIGATION COMPANY, LIMITED,
and
LUCKENBACH STEAMSHIP COMPANY,
a corporation,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT, ZIM ISRAEL NAVIGATION COMPANY, LIMITED, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI OF HERMAN TELFAIR

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet.App. 3-8)[1] is reported at 428 F.2d 127 (CA 5, 1970).

JURISDICTION

The opinion of the Fifth Circuit was entered on June 19, 1970, and a Petition for Rehearing addressed thereto was denied on July 22, 1970 (Pet.App. 1). Petitioner

[1] "(Pet.App.)" refers to the Appendix to the Petition for a writ of certiorari filed in this cause.

Telfair invokes jurisdiction pursuant to: (1) 28 USC 1254(1) (providing that Certiorari is a method by which this Court may review decisions of the Courts of Appeals), 28 USC 2101(c) (providing, inter alia, that a petition for Certiorari in a civil action must be filed within ninety days), and Supreme Court Rules 19(1)(a) and (b), 21 and 22(3).

Of the above-cited provisions only Supreme Court Rule 19 is related to the substantive jurisdiction of this Court. This respondent submits that the petitioner has demonstrated no basis for jurisdiction under Rule 19 criteria. Respondent further submits that the question tendered by the petition is purely "episodic" and constitutes nothing more than a request that this Court reconsider the evidence and analyze specific facts. Such an analysis would have no negotiable value beyond the confines of this case and no relevance whatever to any body of federal law. Accordingly, Respondent submits that there are no "special and important" reasons for assuming jurisdiction of this case under Rule 19.

QUESTION PRESENTED

The Petitioner states, as the question presented, the following (Petition, pages 3-4):

> WHETHER A LONGSHOREMAN, PRIOR TO ENTERING THE HOLD OF A SHIP ON A RUNG LADDER, OWES A DUTY OF CARE TO HIMSELF A) TO SEARCH FOR AND DISCOVER GREASE ON A RUNG, WHERE THERE IS NO EVIDENCE THAT THE GREASE IS VISIBLE FROM THE DECK; OR B) TO WATCH A CO-EMPLOYEE GO DOWN THE LADDER IN ANTICIPATION OF AN UNSEAWORTHY LADDER.

We respectfully submit that the proper statement of the question is as follows:

> WHETHER, IN THE PARTICULAR CIRCUMSTANCES IN THIS CASE, THE FIFTH CIRCUIT'S DECISION THAT THE DISTRICT COURT HAD NOT ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL SO AS TO ALLOW A JURY TO ASSESS THE PLAINTIFF'S CONDUCT IS WORTHY OF CERTIORARI.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner concedes that there are none involved (Petition, page 4) and we agree.

STATEMENT OF THE CASE

Petitioner's statement of the trial and appellate proceedings (Petition, pages 4-8) is adequate. Petitioner's recital of trial testimony is cast in the light most favorable to Petitioner. However, the Fifth Circuit felt that, since Petitioner contended that the question of his comparative contributing negligence should have been summarily and conclusively resolved in his favor by the trial judge, the evidence should be viewed in the light most favorable to the party against whom such summary determination was requested (Pet.App. 6). In this light, the Fifth Circuit summarized the evidence as follows (Pet.App. 6):

> "Here, Beam, the first longshoreman to descend the ladder 'slipped a little bit' but did not fall. Telfair had he been watching, could have seen him slip as did one of the other longshoremen. Telfair was not watching, however, because he climbed onto the ladder while the first longshoreman was still de-

> scending. The seven men who followed Telfair also descended without incident. Testimony shows that Telfair warned them of his accident. But several other individuals used the ladder that afternoon without warning. Although the ladder had not been cleaned, they suffered no mishap. We do not say that contributory negligence was a strong defense. We decide only whether the district court abused its discretion in granting a new trial because it had granted a directed verdict on contributory negligence. We conclude that there was no abuse of discretion."

Thus, the Fifth Circuit, in concluding that the trial judge had not abused his discretion in allowing the jury to assess plaintiff's behavior, observed that there was sufficient evidence to warrant jury consideration of: (1) Whether plaintiff had exercised reasonable care when he failed to observe grease on the ladder either prior to or during his descent thereof even though a prior descender had slipped and his slipping *had* been observed by another standing near the plaintiff; (2) Whether plaintiff descended the ladder in a reasonably prudent manner in view of the fact that several others utilized the uncleaned ladder without any warning and without incident or injury.

ARGUMENT

Under this heading we will set forth reasons for denying the writ in this cause.

Petitioner's stated basis for jurisdiction herein is Supreme Court Rule 19 (1) (a) and (b). This Respondent submits that no basis for jurisdiction has been demonstrated under that rule. The decisions of this Court clearly teach that Rule 19 certiorari jurisdiction (formerly Rule 38(5)) will not be used "to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497 (1925). Further, to warrant Rule 19 attention the issues must be "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75, S. Ct. 614, 616 (1955). Indeed, the only significant class of civil cases in which this Court has become involved in assessing evidence at all are the FELA and Jones Act cases where the lower Court *withheld* issues from jury determinations. See, e.g.: *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874, 77 S. Ct. 16 (1956); *Wilkerson v. McCarthy*, 336 U.S. 53, 69 S. Ct. 413 (1949). The consideration which prompted the Court to grant certiorari even in these cases was succinctly stated in *Wilkerson*, supra, (336 U.S. 70-71):

> "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but *whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.* (Emphasis added)

Rogers v. Missouri Pacific R. Co., 352 U.S. 518, 77 S. Ct. 459 (1957), explained that this discretion is se-

lectively exercised to assure that lower courts do not "deprive litigants of their right to a jury determination." In other words the "importance" detected in these cases is the importance of maintaining the jury as a fact-finding body. Clearly, these decisions furnish no basis for jurisdiction here as the Petitioner is asking the Court to review the evidence once again and conclude that an issue should have been *taken away* from the jury.

Petitioner suggests "conflict" with *Cia Maritima Del Nervion v. J. Flanagan Ship Corp.*, 308 F. 2d 120 (CA 5, 1962); *D/S Ove Skou v. Hebert*, 365 F. 2d 341 (CA 5, 1966); and *Calderola v. Cunard Steamship Co.*, 279 F 2d 475 (CA 2, 1960). Even assuming intracircuit conflict would warrant assumption of jurisdiction, which is doubtful, the prior Fifth Circuit decisions in *Flanagan* and *Hebert* present no conflict whatever.[2] Petitioner quarrels with the Fifth Circuit's decision in this case because it affirms the trial judge's conclusion that contributory negligence was a jury question. Petitioner's reliance upon *Flanagan* and *Hebert* would suggest that those decisions, in similar circumstances, held that the plaintiff should be pronounced blameless by the Court and that the jury should not be allowed to assay his conduct. Such is not the case. *Flanagan* involved only the indemnity claims, the main suit by the injured party having been settled without a trial. The question of whether contributory negligence was for the jury never arose in the case and is not discussed in the Fifth Circuit opinion. *Hebert* was an appeal to the Fifth Circuit in a case tried without a jury in which the injured long-

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[2] Indeed, the author of the Flanagan decision is the author of the decision here under attack.

shoreman was found to be 20% contributorily negligent. The contributory negligence finding of the trial court was affirmed by the Fifth Circuit.

Calderola, supra, does not state whether the question of the plaintiff's contributory negligence was given to or withheld from the jury. And this decision conveys no teaching or ruling whatever regarding the propriety of submitting the question to the jury on particular facts.

Thus there is no conflict.

In sum, this Respondent submits that the sole burden and meaning of the decision of the Fifth Circuit in this case is that under the specific, peculiar, unique facts of this case the trial judge did not abuse his discretion in requiring the plaintiff's conduct to be considered by a jury. The opinion is purely episodic and has no negotiable meaning or value to any body of federal law. In these circumstances, assumption of certiorari jurisdiction is inappropriate.

CONCLUSION

For the foregoing reasons it is respectfully submitted that Telfair's petition for a writ of certiorari should be denied.

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and

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true copies of the foregoing Brief for Respondent Zim Israel Navigation Company, Limited, in Opposition to Petition for Writ of Certiorari have been mailed to Wagner, Cunningham & Vaughan, 403 Morgan Street, Tampa, Florida and Walter H. Beckham, Jr. and Podhurst and Orseck, 2nd Floor, Concord Building, 66 West Flagler Street, Miami, Florida, Attorneys for Petitioner; McClain and Turbiville, Marine Bank Building, Tampa, Florida and James O. Davis, Jr., of Brown, Dixon & Shear, 1810 Exchange National Bank Building, Tampa, Florida, Attorneys for Luckenbach Steamship Co.; Macfarlane, Ferguson, Allison & Kelly, 512 North Florida Avenue, Tampa, Florida, this _____ day of November, 1970.

DEWEY R. VILLAREAL, JR.